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May 20, 2011

**Via Electronic Filing**

Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, SW  
Washington, D.C. 20423-0001

ENTERED  
Office of Proceedings

MAY 20 2011

Part of  
Public Record

Re: STB Finance Docket No. 33388 (Sub-No. 95)

Dear Ms. Brown:

On January 19, 2005, the Surface Transportation Board approved the terms of settlement between Wheeling and Lake Erie Railway Company and Norfolk Southern Railway Company. STB Finance Docket No. 33388 (Sub-No. 95), *CSX Corp. and CSX Transp., Inc., Norfolk southern Corp. and Norfolk Southern Ry. Co. — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corp.* (Jan. 19, 2005). In its filing in that proceeding, NSR noted in footnote 6 that it would submit final documents to the Board no later than ten (10) days after execution of those documents. Although this settlement has already been approved by the Board, NSR fulfills its representation by providing to the Board the five final agreements which are enclosed, and which were executed by the parties on May 10, 2011.

Four (4) of the five (5) final agreements are provided in redacted form. Transmitted to the Board this same day is a Motion for Protective Order containing unredacted signed copies of the four (4) agreements. One of the agreements included with this transmittal letter does not contain highly confidential information, and as a result, is submitted in unredacted form.

Sincerely,

Greg E. Summy

Enclosures

Cc: Parties of Record

**HAULAGE AGREEMENT**

**THIS HAULAGE AGREEMENT** (hereinafter referred to as "Agreement"), entered into as of the 28<sup>th</sup> day of March, 2011, by and between, NORFOLK SOUTHERN RAILWAY COMPANY, including its subsidiaries and affiliates, (hereinafter referred to as "NSR"); and WHEELING & LAKE ERIE RAILWAY COMPANY, (hereinafter referred to as "WLE"). NSR and WLE are sometimes referred to herein individually as a "Party" and collectively as the "Parties."

**WITNESSETH:** That

**WHEREAS**, Norfolk Southern Corporation ("NSC"), parent to NSR, entered into a Transaction Agreement (the "Transaction Agreement") among NSC and CSX Transportation, Inc. ("CSXT"), a wholly-owned subsidiary of CSX Corporation ("CSX"); NSR; Conrail Inc. ("CRR"); Conrail, a wholly-owned subsidiary of CRR; and CRR Holdings LLC;

**WHEREAS**, CSX and NSC have indirectly acquired all the outstanding capital stock of CRR;

**WHEREAS**, the Parties entered into a "Settlement Agreement", addressing certain issues related to the acquisition of the outstanding capital stock of CRR, and implementing and satisfying certain conditions imposed by the Surface Transportation Board ("STB") in connection with its approval of the Transaction Agreement, including the grant by NSR to WLE of trackage rights between Bellevue, Ohio and Toledo, Ohio; and

**WHEREAS**, the Parties submitted the Settlement Agreement to the STB for approval under STB Finance Docket No. 33388 (Sub-No. 95) on August 6, 2004; and

**WHEREAS**, the STB served a decision on January 26, 2005 approving the Settlement Agreement, including WLE's acquisition of trackage rights over NSR between Bellevue, Ohio and Toledo, Ohio; and

**WHEREAS**, NSR and WLE have entered into a Trackage Rights Agreement, dated March 28, 2011, and as provided for in the Settlement Agreement between Bellevue, Ohio and Toledo Ohio; (hereinafter the "Bellevue-Toledo Agreement");

**WHEREAS**, pursuant to the Bellevue-Toledo Agreement, implementing the Settlement Agreement and subject to certain contingencies stated therein, WLE is restricted on the number of trains which it may operate between Bellevue and Toledo via such trackage rights;

**WHEREAS**, pursuant to the Settlement Agreement, NSR agreed to provide to WLE certain backup haulage for overflow traffic;

**WHEREAS**, the Parties agreed that NSR would provide no service guarantee for said haulage service, but that NSR would use its best efforts to meet reasonable service levels, and

**WHEREAS, WLE desires for NSR to provide haulage services as needed and as provided for in the Settlement Agreement, and**

**WHEREAS, WLE desires to enter into this Agreement for the efficient handling of haulage railroad cars between Bellevue, Ohio, and Toledo, Ohio; and**

**WHEREAS, NSR is willing to transport said railcars for WLE between Bellevue, Ohio, and Toledo, Ohio, subject to the provisions hereof; and**

**NOW THEREFORE, the Parties, intending to be legally bound, agree as follows:**

**SECTION 1. RAILCAR DEFINITION**

(a) For purposes of this Agreement, each railroad freight car (including standard flat cars not exceeding ninety-six (96) feet in length), caboose or other equipment furnished in substitution of railroad equipment, loaded or empty, shall count as a single rail car. Each articulated freight car shall be counted as one (1) rail car per platform or well of the articulated freight car. A single unit of RoadRailer equipment (or comparable bimodal freight handling equipment) shall count as one half (1/2) of a rail car. A single unit of Coltainer® equipment, loaded or empty, defined as “an eighty-six (86) foot flat car containing up to four (4) demountable containers, each holding up to twenty-five (25) tons of lading, primarily coal or related commodities” shall count as one (1) rail car.

**SECTION 2. MANAGEMENT AND OPERATIONS**

(a) NSR shall haul Railcars received from WLE, which Railcars are hereinafter referred to as "Haulage Railcars", over NSR's line of railroad between the connections of the Parties at Bellevue, Ohio, and connections with the Ann Arbor Railroad ("AA") or the Canadian National Railway Company ("CN") or its operating subsidiaries at Toledo, Ohio, (hereinafter collectively referred to as "Haulage Trackage"). NSR shall have exclusive management and control over the movement of trains containing Haulage Railcars while on NSR's lines. Haulage Railcars may be handled by NSR over the Haulage Trackage in NSR trains containing non-Haulage Railcars.

(b) The service provided pursuant to this Agreement shall cover only the movement of Haulage Railcars: (1) received by NSR from WLE at Bellevue, Ohio for movement by NSR in haulage to Toledo, Ohio, for physical interchange to AA or CN, or (2) received by NSR from AA or CN at Toledo, Ohio for movement by NSR in haulage to Bellevue, Ohio for physical interchange to WLE. The Haulage Railcars shall be considered as physically delivered from one Party to the other Party when the provisions of the Association of American Railroads (hereinafter referred to as "AAR") Rules governing interchange of cars between carriers have been satisfied. Physical interchange of Haulage Railcars shall take place on tracks designated from time to time by the NSR officer in charge of the facility at which such interchange takes place.

(c) NSR may make repairs to Haulage Railcars, trailers and containers as may be necessary for safe transit while in NSR trains, and NSR may make adjustments to or transfers of lading from crippled, defective, or overloaded Haulage Railcars, trailers and containers, as in its determination may be necessary to move said Haulage Railcars safely. Car repairs made by NSR shall be the responsibility of the car owner pursuant to AAR interchange rules. WLE shall reimburse NSR for

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the cost of such work at rates prescribed in, and submitted pursuant to, the Field and Office Manuals of the Interchange Rules of the AAR.

**SECTION 3. HAULAGE SERVICE**

(a) NSR shall provide the same level of service in the movement of Haulage Railcars as NSR provides for Railcars of similar types moving in its own trains, provided however, that the foregoing shall not constitute a service guarantee, and WLE shall have no claim against NSR for failure to provide such level of service.

**SECTION 4. CAR ACCOUNTING AND WAYBILLS**

(a) Haulage Railcars, trailers and containers shall remain in the revenue waybill and car hire accounts of WLE. NSR shall not be entitled to any line haul revenue for the handling of Haulage Railcars, nor shall NSR participate in the routing of, nor appear in tariffs, waybills or other shipping documents as a participating carrier in connection with, the movement of Haulage Railcars under this Agreement. As between NSR and WLE, WLE shall be responsible for all mileage and car hire charges accruing on Haulage Railcars, and WLE shall report and pay, or arrange to have reported and paid, all appropriate allowances and charges directly to the owner(s) of such Railcars.

(b) WLE shall furnish to NSR, via EDI transmission (or by such other means as may be mutually agreed by the Parties), information necessary for the further handling and movement of the Haulage Railcars that are delivered by WLE to NSR. Such information shall include, for each car:

1. Car initial and number.
2. Loaded or empty.
3. All required hazardous materials information.

4. Such other information as the Parties may agree to be necessary or convenient for the safe and efficient exchange and further movement of such cars.

(c) NSR reserves the right to audit Haulage Railcar records annually or on demand but not more than once per quarter.

#### SECTION 5. HAULAGE CHARGES AND ESCALATION

(a) WLE shall pay to NSR [REDACTED] for each Haulage Railcar, loaded or empty, handled under terms of this Agreement, and received from or delivered to CN at Toledo, Ohio. Such charge shall include classification at Bellevue, Ohio.

(b) WLE shall pay to NSR [REDACTED] for each Haulage Railcar, loaded or empty, handled under terms of this Agreement, and received from or delivered to AA at Toledo, Ohio. Such charge shall include classification at Toledo and Bellevue, Ohio.

(c) NSR shall issue a statement of the number of Haulage Railcars delivered to and received from WLE, along with an invoice of Haulage Charges for Haulage Railcars, on a monthly basis.

(d) The Haulage Charges set forth in Subsection 5(a) hereof, shall be revised, upward or downward, effective July 1 of each year, beginning July 1, 2010, to compensate for the increase or decrease in the cost of labor and material, as reflected in the final Annual Indexes of Chargeout Prices and Wage Rates (1977=100), included in the "AAR Railroad Cost Indexes" and supplements thereto issued by the AAR. In making such determination, the final "Material prices, wage rates and supplements combined (including fuel)" index as shown on Table A - East shall be used. The Haulage Charge shall be revised by calculating the percentage of increase or decrease, as the case may be, in the index figure for the calendar year ending on December 31 prior to the July 1 on

which the adjustment is to be made related to the index for the previous calendar year, and applying that percentage to the Haulage Charge. By way of example, assuming "A" to be the "Material prices, wage rates and supplements combined (including fuel)" final index for the previous calendar year; "B" to be the "Material prices, wage rates and supplements combined (including fuel)" final index for the most recent calendar year; "C" to be the Haulage Charge; "D" to be the percentage of increase or decrease, the new revised Haulage Charge would be determined by the following formula:

$$(1) \quad \frac{B - A}{A} = D$$

$$(2) \quad (C \times D) + C = \text{new revised Haulage Charge, effective}$$

July 1 of the year being escalated

(d) In the event the base for the AAR Railroad Cost indexes issued by the Association of American Railroads shall be changed from the year 1977, appropriate revision shall be made in the base (established as herein provided) for the calendar year 1977. If the AAR or any successor organization discontinues publication of the AAR Railroad Cost Indexes, or changes such indices in a material way, an appropriate substitute for determining the percentage of increase or decrease shall be negotiated by the Parties. In the absence of agreement, the dispute will be arbitrated in the manner prescribed in Section 16.

## SECTION 6. LIABILITY

As between the Parties, responsibility for any loss or destruction of, or damage to, any property whatsoever, and any injury to or death of any person or persons whomever (including employees of NSR and WLE), resulting from, arising out of, incidental to or occurring in connection with this



Agreement ("Loss or Damage"), shall be allocated as follows, without regard to considerations of fault or negligence:

(a) Notwithstanding any other provision of this Section 6, whenever Loss or Damage occurs with one or more trains being involved, and one or more of the involved trains is a train operated by WLE or by a another railroad other than NSR (a "Foreign Railroad") on NSR's tracks, the responsibility of the Parties, as between themselves, for such Loss or Damage shall be determined as follows:

(1) first, Loss or Damage shall be allocated between or among the involved WLE train(s), Foreign Railroad trains and NSR trains in accordance with (i) the provisions of the agreement permitting the WLE or the Foreign Railroad to operate on the NSR lines; and

(2) then, any Loss or Damage allocated to an NSR train handling Haulage Railcars shall be allocated as between the Parties in accordance with the remainder of this Section 6.

(b) Whenever Loss or Damage occurs with only one NSR train being involved, and that NSR train is handling (i) only Haulage Railcars or (ii) both Haulage Railcars and NSR traffic, then WLE shall assume and bear all liability for Loss or Damage to the Haulage Railcars moving in such NSR train, and NSR shall assume and bear all liability for NSR traffic moving in such NSR train. In such event, any other Loss or Damage, including without limitation Loss or Damage to employees or locomotives of the Parties (which employees and locomotives are hereby specifically excluded from the allocation provided for in the immediately preceding sentence) and any Loss or Damage to third party Cars and Equipment not otherwise allocated pursuant to Section 6(a), to trackage or to property, and any injury to or death of any other person or persons, so occurring shall be: (i) borne solely by WLE if the involved NSR train is handling only Haulage Railcars, or (ii) borne by each of NSR and WLE in proportion to the number of Railcars in such NSR train that are moving in that

Party's revenue waybill or car hire account, if the train is handling both Haulage Railcars and NSR traffic.

(c) Whenever Loss or Damage occurs with more than one train, and one or more of such trains is handling (i) only Haulage Railcars or (ii) both Haulage Railcars and NSR traffic, then WLE shall assume and bear all liability for Loss or Damage to Haulage Railcars moving in such NSR train(s), and NSR shall assume all liability for NSR traffic moving in such NSR train(s). In such event, any other Loss or Damage, including without limitation Loss or Damage to employees or locomotives of the Parties (which employees and locomotives are hereby specifically excluded from the allocation provided for in the immediately preceding sentence) and any Loss or Damage to third party Cars and Equipment not otherwise allocated pursuant to Section 6(a), to trackage or to property, and any injury to or death of any other person or persons, so occurring shall be allocated between the Parties in the following manner: first, the total amount of such other Loss or Damage shall be allocated equally among the trains involved, then (i) all such Loss or Damage allocated to any train(s) which is (are) handling only NSR traffic shall be borne solely by NSR, (ii) all such Loss or Damage allocated to any train(s) which is (are) handling only Haulage Railcars shall be borne solely by WLE, and (iii) all such Loss or Damage which is allocated to any train(s) handling both Haulage Railcars and NSR traffic shall be shared and borne by each of NSR and WLE in proportion to the number of railcars in such train that are moving in that Party's revenue waybill or car hire account.

(d) Notwithstanding anything to the contrary in Sections 6(b) and 6(c) above, when any damage to or destruction of the environment, including without limitation land, air, water, wildlife, and vegetation, occurs with one or more NSR trains handling Haulage Railcars being involved, then, as between themselves, (i) NSR shall be solely responsible for any damage or destruction to

the environment and to third parties which results solely from a substance transported in NSR traffic and/or an NSR locomotive from which there was a release, (ii) WLE shall be solely responsible for any damage or destruction to the environment and to third parties which results solely from a substance transported in Haulage Railcars from which there was a release, and (iii) responsibility for damage or destruction to the environment and to third parties which results from one or more substances which was (or were) being transported in Railcars in the revenue waybill and car hire accounts of both NSR and WLE from which there was a release shall be shared by the Parties in proportion to the total number of such Railcars in the revenue waybill and car hire account of each Party from which there was such a release.

(e) Whenever circumstances require wrecking service or wrecking train service in connection with the subject of this Agreement, NSR shall arrange for such services to be performed as promptly as reasonably possible, and the cost thereof shall be allocated as between the Parties in accordance with the terms of this Section 6.

(f) If any suit or action shall be brought against a Party for Loss or Damage which under the provisions of this Agreement are in whole or in part the responsibility of the other Party, said responsible Party shall be notified in writing by the Party sued, and the Party so notified shall have the right and be obligated to take part in the defense of such suit and shall pay its share of the judgment and the costs and expense incurred in such suit in accordance with the terms of this Section 6.

(g) In every case of death or injury suffered by an employee of NSR or WLE, when compensation to such employee or employee's dependents is required to be paid under any present or future state or federal worker's compensation, occupational disease, employers' liability or other law, and one or more of the Parties under provisions of this Agreement is/are required to pay same

or a portion of same in installments over a period of time, said Party or Parties shall not be released from paying any such future installment(s) by reason of the expiration or other termination of this Agreement prior to any of the respective date(s) upon which any such future installments are to be paid.

(h) Whenever any liability, cost or expense is assumed by or allocated to a Party under this Section 6, that Party shall (i) forever protect, defend, indemnify and save harmless the other Party and its parent corporation, subsidiaries and affiliates, and all of their respective directors, officers, agents, and employees from and against that liability, cost and expense, regardless of whether such liability, cost and expense was caused in whole or in part by the fault, failure, negligence, misconduct, malfeasance or misfeasance of the indemnitees or their directors, officers, agents or employees, and (ii) defend such indemnitees against such claims with counsel selected by the responsible Party and reasonably acceptable to the indemnified Party.

(i) Each Party shall investigate, adjust and defend all cargo related claims filed with it in accordance with 49 U.S.C. Section 11706 or 49 C.F.R. Section 1005, or in accordance with any applicable transportation contract filed pursuant to 49 U.S.C. Section 10709.

(j) All costs and expenses in connection with the investigation, adjustment and defense of any claim or suit (other than cargo-related claims made against a Party by a customer whose traffic was moving in the revenue and/or car hire account of such Party) under this Agreement shall be included as costs and expenses in applying the liability provisions of this Section 6; provided, however, that salaries or wages of full-time agents, full-time attorneys and other full-time employees of any Party engaged directly or indirectly in such work shall be borne by such Party.

(k) No Party shall settle or compromise any claim, demand, suit or cause of action (other than a cargo-related claim filed with it in accordance with 49 U.S.C. Section 11706 or 49 C.F.R. Section

1005, or in accordance with any applicable transportation contract filed pursuant to 49 U.S.C.

Section 10709) for which the other Party has any liability under this Agreement without the concurrence of such other Party if the consideration for such settlement or compromise exceeds Thirty-Five Thousand Dollars (US) (\$35,000). The foregoing amount of Thirty-Five Thousand Dollars (\$35,000) shall be adjusted annually in accordance with the provisions of Section 5.

#### SECTION 7. PAYMENT OF BILLS

(a) Any discrepancies in the billing shall be reconciled between the Parties and shall be paid in the accounts of a subsequent statement. If WLE disputes any portion of a haulage invoice, it shall nevertheless pay such haulage invoice in full (unless such dispute involves a material amount in relation to the total amount of such haulage invoice), subject to adjustment upon resolution of the dispute; provided, however, that (i) no exception to any charge in a haulage invoice shall be honored, recognized or considered if filed after the expiration of three (3) years from the date of the haulage invoice, and (ii) no invoice shall be rendered more than three (3) years (a) after the last day of the calendar month in which the expense covered thereby is incurred, or (b) in the case of charges disputed as to amount or liability, after the amount owed or liability therefor is established. WLE and NSR each shall have the right, at its own expense, to audit the records of the other Party pertaining to Haulage Railcars or Haulage Services provided under this Agreement, at any time within three (3) years of the date of the relevant haulage invoice. All such audits shall be conducted at reasonable intervals, locations and times. Each Party agrees that all information disclosed to it or its representatives in connection with such an audit will be held in strictest confidence and will not be disclosed to any third party (other than to an arbitrator in connection with an arbitration conducted pursuant to Section 16 of this Agreement or as required by applicable law). Any

adjustment resulting from an audit conducted pursuant to this subsection with respect to which NSR and WLE are in concurrence shall be reflected in a subsequent haulage invoice.

(b) Bills rendered pursuant to this Agreement, other than those set forth in Section 5 hereof, shall include direct labor and material costs, together with surcharges, overhead percentages and equipment rentals in effect at the time any work is performed.

#### SECTION 8. CLAIMS

(a) WLE will investigate, adjust, and defend all cargo related claim liability arising from a shipment filed with it in accordance with 49 U.S.C. Section 11706 or 49 C.F.R. Section 1005, or in accordance with any applicable transportation contract filed pursuant to 49 U.S.C. Section 10709.

#### SECTION 9. COMPLIANCE WITH LAW

(a) Each Party shall comply with all applicable laws, rules, regulations, and orders promulgated by any government or governmental agency, which affects the services, provided hereunder. If any fine, penalty, cost or charge is imposed or assessed on or against either Party by reason of the other Party's non-compliance with any such laws, rules, regulations or orders, such non-complying Party shall promptly reimburse and indemnify the other Party for or on account of any such fine, penalty, cost, or charge, and all expenses and attorney's fees incurred in connection therewith, and, to the extent feasible, such non-complying Party shall defend the interests of that other Party in any related legal proceeding free of cost, charge, or expense to that other Party.

#### SECTION 10. TERM

(a) This Agreement shall become effective on the date first appearing above, and following the expiration of any time periods required by the issuance of labor notices by NSR, if any, (the "Effective Date") herein) and shall remain in full force and effect for a period of twenty-five (25) years. The Effective Date of this Agreement shall be confirmed by letter agreement signed by NSR and WLE. WLE may terminate this Agreement upon giving NSR at least thirty (30) days advance written notice

(b) This Agreement shall immediately terminate upon occurrence of any of the following:

(i) The termination of the Trackage Rights Agreement dated as of March 28, 2011.

(ii) The restriction on the number of trains permitted pursuant to Section 2(g) of the Trackage Rights Agreement dated as of March 28, 2011 has been removed.

(c) Termination or expiration of this Agreement shall not relieve or release either Party from any liability it may have incurred or any obligation which may have accrued under any provision of this Agreement prior to said termination.

#### SECTION 11. FORCE MAJEURE

(a) The obligations, other than payment obligations, of the Parties to this Agreement shall be subject to force majeure (which shall include but not limited to strikes, riots, floods, accidents, Acts of God, and other causes or circumstances beyond the control of the Party claiming such force majeure as an excuse for nonperformance), but only as long as, and to the extent that, such force majeure shall prevent performance of such obligations.

**SECTION 12. SUCCESSORS AND ASSIGNS**

(a) This Agreement shall inure to the benefit of and be binding upon the Parties and their respective successors and permitted assigns. Neither this Agreement (including the documents and instruments referred to herein) nor any of the rights, interests or obligations hereunder, shall be assigned by any Party, including by operation of law, without the prior written consent of the other Party, except to a controlled subsidiary.

**SECTION 13. GENERAL PROVISIONS**

(a) This Agreement and each and every provision hereof are for the exclusive benefit of the Parties and not for the benefit of any third party. Nothing herein contained shall be taken as creating or increasing any rights in any third party to recover by way of damages or otherwise against either of the Parties hereto.

(b) All section headings are inserted for convenience only and shall not affect any construction or interpretation of this Agreement.

(c) This Agreement contains the entire agreement of the Parties with respect to movement of Haulage Railcars over the Haulage Trackage, and it supersedes any and all other understandings between the Parties with respect to that subject matter.

(d) No term or provision of this Agreement may be changed, waived, or terminated except by an instrument in writing signed by both Parties.

(e) All words, terms, and phrases used in this Agreement shall be considered in accordance with the generally applicable definition or meaning of such words, terms, and phrases in the railroad industry.

(f) If any term or provision hereto is determined to be unenforceable, such determination shall



affect that term or provision only and all of the other terms and provisions of this Agreement shall continue in full force and effect.

(g) The termination or expiration of this Agreement shall not relieve nor release either Party from any obligations or liabilities accrued as of the time of such termination or expiration.

(h) Nothing in this Agreement shall serve to create any new or additional obligation whatsoever between NSR and WLE with respect to car ownership.

(i) This Agreement shall be governed and interpreted in accordance with the laws of the Commonwealth of Virginia, without regard to application of the choice of law principles thereof.

(j). This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, but all such separate counterparts shall together constitute but one and the same instrument.

#### SECTION 14 INSURANCE

NSR undertakes to act and will continue to act as a self-insurer of its liabilities, if any, and will pay all sums which it shall become legally obligated to pay in connection with this Agreement. NSR further certifies that it maintains insurance coverage above its self-insured retention.

(a) WLE shall procure and maintain in effect during the life of this Agreement a policy or policies of insurance covering the liability to which it is or may be subject under Section 6 hereof. Such insurance shall provide minimum limits of Five Million Dollars (\$5,000,000) per occurrence but may be subject to an annual aggregate limit of Five Million Dollars (\$5,000,000) and a per occurrence self-insured retention of Twenty Five Thousand Dollars (\$25,000). Said policy or policies shall name NSR and its parent and affiliated corporations as additional insureds.

(b) If the insurance provided under this Section 14 takes the form of a Claims Made Policy,

WLE agrees to purchase whatever supplemental coverage may be necessary to provide continuous supplemental coverage of its potential liability under this Agreement, with annual occurrence and annual aggregate limits no less than those required hereunder, for a period of time at least five (5) years following the termination of this Agreement. WLE further agrees to immediately give written notice to the Director Risk Management, Norfolk Southern Corporation, Three Commercial Place, Norfolk, Virginia 23510-2191, of any claim or notice of incident or notice of potential claim that is required to be reported to its liability insurance company.

(c) On or before any anniversary date of this Agreement which occurs more than one (1) year after its Commencement Date, NSR may require an increase in the amount of insurance coverage required by this Section 14, or changes in the terms and conditions of the policy or policies, provided the amount of the increase does not exceed an average of Two Million Dollars (\$2,000,000) for each year that this Agreement has been in effect.

(d) Every policy of insurance obtained by WLE pursuant to the requirements of this Section 14 shall contain provisions requiring that the insurance carriers give NSR at least thirty (30) days notice, in writing, of any proposed policy cancellation and of any material modification of the terms and conditions of the policy. The terms and conditions of each policy of insurance obtained by WLE to satisfy the requirements of this Section 14 will be subject to the approval of NSR.

(e) Within thirty (30) days of execution of this Agreement, WLE will furnish to the above referenced Director Risk Management an accurate copy of each policy of insurance obtained pursuant to the requirements of this Agreement. Compliance with this requirement will not relieve WLE of any other obligation under this Agreement and will in no way limit or modify WLE's obligation to provide the specific insurance coverage required by this Agreement. Evidence of subsequent renewal of such insurance or of any material change must be furnished to the above

referenced Director Risk Management as stipulated in Subsection (b) above.

**SECTION 15. DEFAULT AND TERMINATION**

(a) In the event of any substantial failure on the part of either Party to perform its obligations under this Agreement and its continuance in such default for a period of sixty (60) days after written notice thereof by certified mail from the non-defaulting Party, the non-defaulting Party shall have the right, at its option, after first giving thirty (30) days written notice thereof by certified mail, and notwithstanding any waiver of the non-defaulting Party of any prior breach thereof, to terminate this Agreement.

(b) The exercise of such right shall not impair the non-defaulting Party's rights under this Agreement or any cause of action it may have against the defaulting Party for the recovery of damages.

**SECTION 16. ARBITRATION**

(a) Any irreconcilable dispute arising between the Parties with respect to this Agreement shall be settled through binding arbitration by a sole, disinterested arbitrator to be selected jointly by the Parties. If the Parties fail to select such arbitrator within sixty (60) days after demand for arbitration is made by either Party hereto, and then they shall jointly submit the matter to binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association. The decision of the arbitrator shall be final and conclusive upon the Parties.

(b) Each Party to the arbitration shall pay the compensations, costs, fees and expenses of its own witnesses, exhibits and counsel. The compensation, costs and expenses of the arbitrator, if any, shall be borne equally by the Parties. The arbitrator shall not have the power to award consequential or

punitive damages or to determine violations of criminal laws or antitrust laws. Pending the award of the arbitrator, there shall be no interruption in the transaction of business under this Agreement, and all payments in respect thereto shall be made in the same manner as prior to the arising of the dispute until the matter in dispute shall have been fully determined by arbitration, and thereupon such payment or restitution shall be made as required by the decision or award of the arbitrator.

**SECTION 17. NOTICE**

Any notice required or permitted to be given by one Party to the other under this Agreement shall be deemed given on the date sent by certified mail, or by such other means as the Parties may mutually agree, and shall be addressed as follows:

If to WLE:

c/o President  
Wheeling & Lake Erie Railway Company  
100 East First Street  
Brewster, Ohio 44613

If to NSR:

Executive Vice President Operations  
Norfolk Southern Corporation  
Three Commercial Place  
Norfolk, Virginia 23510-2191

With copies to:

Senior Director – Joint Facilities  
Norfolk Southern Corporation  
1200 Peachtree Street, NE, Box 158  
Atlanta, Georgia 30309

Either Party may provide changes in the above addresses to the other Party by personal service or certified mail.

**SECTION 18. CONFIDENTIALITY**

(a) Except as provided by law or by rule, order, or regulation of any court or regulatory agency with jurisdiction over the subject matter of this Agreement, or as may be necessary or appropriate for a Party to enforce its rights under this Agreement, during the initial and any renewal term of this Agreement and during three (3) years after termination or expiration of this Agreement, the terms and provisions of this Agreement and all information to which access is provided or obtained hereunder will be kept confidential and will not be disclosed by either NSR or WLE to any party other than NSR's and WLE's affiliates and the respective officers, employees, and attorneys of those affiliates, without the prior written approval of the other Party.

**SECTION 19. INDEMNITY COVERAGE**

(a) As a part of the consideration hereof, each Party hereby agrees that each and all of its indemnity commitments in this Agreement in favor of the other Party hereto shall extend to and indemnify the parent corporation, its subsidiaries and affiliates of such other Party, and all of their respective directors, officers, agents and employees.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be duly executed as of the date first above written.

WITNESS: WHEELING & LAKE ERIE RAILWAY COMPANY

\_\_\_\_\_ By: \_\_\_\_\_  
TITLE \_\_\_\_\_

WITNESS: NORFOLK SOUTHERN RAILWAY COMPANY

\_\_\_\_\_ By: \_\_\_\_\_  
TITLE: \_\_\_\_\_

**CLAIRTON, PENNSYLVANIA TO BELLEVUE, OHIO  
TRACKAGE RIGHTS AGREEMENT**

THIS AGREEMENT, entered into as of this 28th day of March, 2011, by and between WHEELING & LAKE ERIE RAILWAY COMPANY (hereinafter referred to as "WLE"), and NORFOLK SOUTHERN RAILWAY COMPANY (hereinafter referred to as "NSR").

WHEREAS, in a settlement agreement entered into by Norfolk Southern Corporation ("NSC") and WLE ("Settlement Agreement") addressing certain issues related to the acquisition of the outstanding capital stock of Conrail, Inc. by NSC and CSX Corporation and implementing and satisfying certain conditions imposed by the Surface Transportation Board ("STB") in STB Finance Docket No. 33388, CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company – Control and Operating Leases/Agreements – Conrail Inc and Consolidated Rail Corporation, WLE agreed to grant overhead trackage rights to NSR over WLE's lines between Clairton, Pennsylvania and Bellevue, Ohio with rights of ingress and egress at Mingo Jct., Jewett, Bowerston and Orrville, Ohio to the extent permitted; and

WHEREAS, by decision served January 26, 2005 in STB Finance Docket No. 33388 (Sub-No. 95), CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company -- Control and Operating Leases/Agreements – Conrail Inc. and Consolidated Rail Corporation [Petition to Approve Settlement Agreement and Exempt Embraced Transactions], the STB approved the Settlement Agreement and in STB Finance Docket No. 33388 (Sub-No.

98), Norfolk Southern Railway Co. -- Trackage Rights Exemption -- Wheeling & Lake Erie Railway Co. Between Clairton, PA and Bellevue, OH, accepted the notice of exemption filed by NSR for its acquisition of overhead trackage rights over WLE between Clairton, Pennsylvania and Bellevue, Ohio;

NOW, THEREFORE, the parties hereto, intending to be legally bound, agree as follows:

**SECTION 1. GRANT OF TRACAGE RIGHTS**

(a) Subject to the terms and conditions herein provided, WLE hereby grants NSR the non-exclusive right to operate its trains, locomotives, cars and equipment with its own crews, in its own account (hereinafter referred to as "Trackage Rights") over the following segments of WLE's railroad shown on the plan attached hereto, made a part hereof and marked Exhibit "I" (hereinafter referred to as the "Subject Trackage"):

- Zone 1        -        Between the point of connection between NSR and WLE at point "A" at Bellevue, Ohio (WLE Milepost H-54.7) and the point of connection between WLE and NSR at point "B" at Orrville Junction, Ohio (WLE Milepost B-121.9).
- Zone 2        -        Between the point of connection between WLE and NSR at point "B" at Orrville Junction, Ohio (WLE Milepost B-121.9) and the point of connection between WLE and the line operated by the Columbus & Ohio River Railroad Company ("C&OR") at point "C" at Bowerston, Ohio (WLE Milepost B-168.5).



Zone 3 - Between the point of connection between WLE and the line operated by C&OR at point "D" at Jewett, Ohio (WLE Milepost K-115.0) and the point of connection between WLE and NSR at point "E" at Mingo Jct., Ohio (WLE Milepost K-91.5).

Zone 4 - Between the point of connection between WLE and NSR at point "E" at Mingo Jct., Ohio (WLE Milepost K-91.5) and the point of connection between WLE and NSR at point "G" at Clairton, Pennsylvania (WLE Milepost 5.2) via Pittsburgh and Pierce, Pennsylvania.

(b) Between Jewett and Bowerston, Ohio, WLE operates pursuant to trackage rights granted to WLE by C&OR over a line owned by the State of Ohio and operated by C&OR. WLE agrees to use its best efforts to permit NSR to obtain trackage rights over that segment.

## **SECTION 2. USE OF SUBJECT TRACKAGE**

(a) NSR's use of the Subject Trackage shall be in common with WLE and any other user of the Subject Trackage, and WLE's right to use the Subject Trackage shall not be diminished by this Agreement. WLE shall retain the right to grant to other persons rights of any nature in the Subject Trackage.

(b) NSR shall have bridge rights only between the endpoints of the Subject Trackage with rights of ingress and egress at Mingo Jct., Jewett, Bowerston and

Orrville, Ohio to the extent permitted. NSR shall not perform any local freight service whatsoever at any point located on the Subject Trackage.

(c) WLE shall have exclusive control of the management and operation of the Subject Trackage. NSR shall not have any claim against WLE for liability on account of loss or damage of any kind in the event the use of the Subject Trackage by NSR is interrupted or delayed at any time from any cause.

(d) NSR shall have the right to operate in either direction over the Subject Trackage.

(e) Except as may otherwise be provided by this Agreement, NSR shall not use any part of the Subject Trackage for the purpose of switching, storage or servicing cars or equipment, or the making or breaking up of trains, except that nothing contained herein, upon prior approval of WLE, shall preclude the emergency use by NSR of such auxiliary Subject Trackage as may be designated by WLE for such purposes.

(f) NSR will not permit or admit any third party to the use of all or any portion of the Subject Trackage, nor under the guise of doing its business, contract or make any agreement to handle as its own trains, locomotives, cabooses or cars over or upon the Subject Trackage, or any portion thereof, the trains, locomotives, cabooses or cars of any such third party which in the normal course of business would not be considered the trains, locomotives, cabooses or cars of NSR, or in any other way provide haulage service to others on or over the Subject Line.

**SECTION 3. MISCELLANEOUS SPECIAL PROVISIONS**

(a) When operating over the Subject Trackage, NSR's locomotives and crews will be equipped by NS at NSR's sole expense with all communications equipment normally used by WLE in directing train movements on the Subject Property.

(b) Procedures for qualification and occupancy of the Subject Trackage shall be arranged by the local supervision of each carrier, but any expense incurred by WLE to qualify NSR crews shall be borne by NSR. All control and usage shall be subject to the approval of WLE's dispatcher.

(c) Before NSR's locomotives enter onto the Subject Trackage, NSR shall ascertain that the Subject Trackage is clear and shall await confirmation from WLE's dispatcher that such permission has been issued to allow NSR's movements on or over the Subject Trackage. Upon completing its operations and clearing the Subject Trackage, NSR will notify WLE's dispatcher that it has completed its operations and that its equipment has cleared the Subject Trackage. Once NSR has notified WLE's dispatcher that it has cleared the Subject Trackage, NSR shall not reenter the Subject Trackage without again obtaining permission from WLE's dispatcher.

(d) WLE shall have the right to exclude from its tracks any employee of NSR determined to be in violation of, or who shall refuse to abide by, WLE rules, regulations, orders, practices, or instructions issued by WLE timetable or otherwise. NSR shall release, indemnify, defend, and save harmless WLE and its parent corporation, subsidiaries and affiliates and all of their respective directors, officers, agents and employees from and against any and all claims and expenses resulting from such exclusion.

**SECTION 4. COMPENSATION**

(a) The Current Charge to be paid by NSR for the Trackage Rights covered by this Agreement shall be forty-five and twenty-two hundredths cents (US\$0.4522) per car mile applied to each Zone on the Subject Trackage as follows:

- (i) Zone 1 - NSR shall pay WLE [REDACTED] (67.2 miles x [REDACTED] per car mile) per loaded and empty car operating over Zone 1.
- (ii) Zone 2 - NSR shall pay WLE [REDACTED] (46.6 miles x [REDACTED] per car mile) per loaded and empty car operating over Zone 2.
- (iii) Zone 3 - NSR shall pay WLE [REDACTED] (23.5 miles x [REDACTED] per car mile) per loaded and empty car operating over Zone 3.
- (iv) Zone 4 - NSR shall pay WLE [REDACTED] (56.9 miles x [REDACTED] per car mile) per loaded and empty car operating over Zone 4.

For purposes of this Agreement, each railroad freight car (including standard flat cars not exceeding ninety-six (96) feet in length), locomotive, caboose or other equipment furnished in substitution of railroad equipment, loaded or empty, shall count as a single rail car. Each articulated freight car shall be counted as one (1) rail car per every platform or well of the articulated freight car. A single unit of RoadRailer® equipment (or comparable bimodal freight handling equipment) shall count as one half (1/2) of a

rail car. A single unit of Coltainer® equipment, loaded or empty, defined as "an eighty-six (86) foot flat car containing up to four (4) demountable containers, each holding up to twenty-five (25) tons of lading, primarily coal or related commodities," shall count as one rail car. The Current Charge shall be subject to change to reflect any increase or decrease subsequent to the Effective Date of this Agreement in labor, material and other costs, as more fully set forth below.

(b) NSR shall submit a monthly payment to WLE; said payment shall include a statement which shall list the number of cars operated by NSR over the Subject Trackage for NSR's previous month's use of each Zone, computed in accordance with this Section 4.

(c) The Current Charge set forth in Section 4(a) hereof shall be revised upward or downward each year, beginning with the bill rendered for the month of July first following the "Effective Date" of this Agreement, to compensate for the increase or decrease in the cost of labor and material, excluding fuel, as reflected in the Annual Indexes of Chargeout Prices and Wage Rates (1977=100), included in "AAR Railroad Cost Indexes" and supplements thereto, issued by the Association of American Railroads ("AAR"). In making such determination, the Final "Material prices, wage rates and supplements combined (excluding fuel)" indexes for the East District shall be used. The Current Charge shall be revised by calculating the percent of increase or decrease in the index for the latest calendar year as related to the index for the previous calendar year and applying that percentage to the Current Charge.

(d) In the event the base for the Annual Indexes of Charge-Out Prices and Wage Rates issued by the AAR shall be changed from the year 1977, appropriate

revision shall be made. If the AAR or any successor organization discontinues publication of the Annual Indexes of Charge-Out Prices and Wage Rates, an appropriate substitute for determining the percentage of increase or decrease shall be negotiated by the parties hereto. In the absence of agreement, the parties shall submit the matter to binding arbitration under the terms of Section 16 of this Agreement.

(e) Under no circumstances shall the Current Charge paid to WLE by NSR be less than the Current Charge set forth in Section 4(a) hereof.

## **SECTION 5. PAYMENT OF BILLS**

(a) All payments called for under this Agreement shall be made within thirty (30) days after the date of the bills therefor. No payments shall be withheld because of any dispute as to the correctness of items in the bills rendered, and any discrepancies reconciled between the parties hereto shall be adjusted in the accounts of a subsequent month. The records of each party hereto, insofar as they pertain to matters covered by this Agreement, shall be open at all reasonable times to inspection by the other party for a period of three (3) years from the date of billing.

(b) Bills rendered pursuant to the provisions of this Agreement, other than those provided for in Section 4, shall include direct labor and material costs, together with the surcharges, overhead percentages and equipment rentals as specified by WLE at the time any work is performed by WLE for NSR or shall include actual costs and expenses, upon mutual agreement of the parties.

**SECTION 6. MAINTENANCE AND OPERATIONS**

(a) NSR hereby acknowledges that the portion of the Subject Trackage between Clairton and Pierce, Pennsylvania ("the Clairton Branch") requires substantial upgrading before NSR may begin to exercise the trackage rights granted to it herein. To facilitate such upgrading, the parties shall agree in writing to a "Line Upgrade Project List" that identifies the track upgrades and any other improvements to the Clairton Branch that the parties mutually agree are necessary to accommodate NSR's trains over the Clairton Branch. The cost of upgrading the track and any other improvements to the Clairton Branch identified in the Line Upgrade Project List shall be allocated between the parties as the parties shall mutually agree prior to commencement of such upgrading and improvements.

(b) WLE shall, at its own expense, and with its own supervision and labor, maintain, repair, renew, and operate the Subject Trackage, provided, however, that WLE need not maintain, repair or renew the Subject Trackage to any better condition than it is in as of the Effective Date or as upgraded pursuant to subparagraph (a) above, reasonable wear and tear excepted. Following upgrade of the Clairton Branch pursuant to subparagraph (a) above, WLE shall, at its own expense, and with its own supervision and labor, maintain the line to no less than the applicable Federal Railroad Administration ("FRA") safety standard and speed to which the line was upgraded, for the duration of this Agreement.

(c) NSR shall not by reason of failure or neglect on the part of WLE hereto to maintain, repair, or renew the respective ownership segments of the Subject Trackage, have or make any claim against WLE, or its directors, officers, agents or employees for

any injury to or death of any person or persons whomsoever, or for any damage to or loss or destruction of any property whatsoever, or for any damages of any nature suffered by a party resulting from any such failure or neglect.

(d) If by reason of any mechanical failure or for any other cause not resulting from an accident or derailment, a train, locomotive or equipment of NSR becomes stalled or unable to proceed under its own power, or if in emergencies crippled or otherwise defective cars are set out of NSR's trains on the Subject Trackage, WLE shall furnish motive power or such other assistance as may be necessary to haul, help, or push such trains, locomotives, or cars, or to properly move the disabled equipment off the Subject Trackage. For such service, NSR shall pay WLE a reasonable charge therefor, which shall be in accordance with WLE's Schedule of Surcharges and Rates for Billings to U.S. Railroads and which shall be comparable to the rate schedules of U.S. Class I Railroads.

(e) If it becomes necessary to make repairs to or adjust or transfer the lading of such crippled or defective cars in order to move them off the Subject Trackage, such work shall be done by WLE. For such service, NSR shall pay WLE a reasonable charge therefor, which shall be in accordance with WLE's Schedule of Surcharges and Rates for Billings to U.S. Railroads and which shall be comparable to the rate schedules of U.S. Class I railroads.

(f) Subject to the mutual agreement of the parties hereto, NSR may operate, at its own expense, a track geometry car over the line



**SECTION 7. MILEAGE AND CAR HIRE**

All mileage and car hire charges accruing on cars in each party's trains on the Subject Trackage shall be assumed by that party and reported and paid by that party directly to the owner of such cars.

**SECTION 8. CLEARING OF WRECKS**

Whenever use of the Subject Trackage requires rerailing, wrecking service or wrecking train service, WLE shall arrange for such service, including the repair and restoration of roadbed, track and structures. The cost and expense thereof, including without limitation, loss of, damage to, and destruction of any property whatsoever and injury to or death of any person or persons whomsoever resulting therefrom, shall be apportioned in accordance with the provisions of Section 11 hereof. All locomotives, cars, and equipment and salvage from the same so picked up and removed which are owned by or under the management and control or used by a party at the time of such wreck shall be promptly delivered to it.

**SECTION 9. ADDITIONS TO AND/OR RETIREMENTS**

(a) The cost and expense of future additions or changes shall be borne by the party or parties for whose benefit they are made. However, any changes required, subsequent to the Effective Date hereof, by any public authority shall be borne by the parties hereto in proportion to the parties' usage over the affected location, as measured by usage during the twelve (12) month period after the addition or change is put into

service. Nothing in this Section 9(a) shall be interpreted as expressing an intention of either party to request or consent to any future additions or changes.

(b) In accordance with the provisions of Section 14, WLE shall have the right to retire and eliminate all or part of the Subject Trackage. All costs and expenses relating to removal of track, associated track appurtenances, signals and related facilities necessary to effect abandonment, discontinuance or complete withdrawal of either party shall be at the sole cost and expense of said party.

#### **SECTION 10. CONSTRUCTION AND MAINTENANCE OF CONNECTIONS**

(a) All existing connections or facilities which are jointly used by the parties hereto under existing agreements or practices shall continue to be maintained, repaired, and renewed by and at the expense of the party or parties responsible for such maintenance, repair or renewal under such agreements or practices.

(b) Any additional connections to the Subject Trackage which may be required will be subject to WLE's approval (including design), and shall be constructed, maintained, repaired and renewed as follows:

- (i) NSR or others shall furnish all labor and material and shall construct, maintain, repair and renew at their sole cost and expense such portions of the tracks located on the right-of-way of NSR or others which connect the respective lines of the parties hereto; and
- (ii) WLE shall furnish all labor and material, and shall construct, maintain, repair and renew with its forces or by separate contract

with others, at the sole cost and expense of NSR such portions of the tracks located on the right-of-way of WLE which connect the respective lines of the parties hereto. Upon termination of the underlying right of movement governed by this Agreement, WLE may at its option remove that portion of such trackage and appurtenances located on property of WLE at the sole cost and expense of NSR. The salvage material removed shall be released to NSR or, as otherwise agreed upon, WLE will credit NSR the current fair market value of said salvage.

#### **SECTION 11. LIABILITY**

The responsibility of the parties hereto as among themselves for loss of, damage to, or destruction of any property whatsoever, or injury to or death of any person or persons whomsoever, or any damage to or destruction of the environment whatsoever, including without limitation land, air, water, wildlife, and vegetation resulting from, arising out of, incidental to, or occurring in connection with this Agreement, shall be determined as follows:

(a) Whenever any loss of, damage to, or destruction of any property whatsoever, or injury to or death of any person or persons whomsoever, or any damage to or destruction of the environment whatsoever, including without limitation land, air, water, wildlife and vegetation, occurs with the trains, locomotives, cars, or equipment of, or in the account of, one party hereto being involved, without the trains, locomotives, cars or equipment of, or in the account of, the other party hereto being involved, such

involved party shall assume all liability therefor and bear all cost and expense in connection therewith and shall forever protect, defend, indemnify, and hold harmless the other party hereto, its parent and subsidiaries, and each of their respective directors, officers, agents, and employees from and against any such liability, cost and expense.

(b) Whenever any loss of, damage to, or destruction of any property whatsoever, or injury to or death of any person or persons whomsoever, or any damage to or destruction of the environment whatsoever, including without limitation land, air, water, wildlife, and vegetation, occurs with the trains, locomotives, cars or equipment of, or in the account of, both WLE and NSR being involved, each shall separately assume and bear all liability, cost, and expense for loss of and damage to said trains, locomotives, cars (including without limitation lading), and equipment operated by each of them and for injury to and death of each of their respective directors, officers, agents, and employees (including sole employees), and persons in each of their care and custody. All liability, cost, and expense for injury to and death of any other person or persons whomsoever, and for loss of, damage to, and destruction of all other property (including without limitation the Subject Trackage) so occurring shall be borne equally by the parties hereto.

(c) Whenever any loss of, damage to, or destruction of any property whatsoever, or injury to or death of any person or persons whomsoever, or any damage to or destruction of the environment whatsoever, including without limitation land, air, water, wildlife, and vegetation, occurs without the trains, locomotives, cars, or equipment of, or in the account of, any party hereto being involved, or if it cannot be determined which party's or parties' trains, locomotives, cars or equipment are involved,

each party hereto shall separately assume and bear all liability, cost, and expense for injury to and death of each of their directors, officers, agents, and employees (including sole employees), and persons in each of their care and custody, and all liability, cost, and expense for injury to and death of any other person or persons whomsoever, and for loss of, damage to, and destruction of all other property (including without limitation the Subject Trackage) so occurring shall be borne equally by the parties hereto.

(d) Notwithstanding anything to the contrary in Sections 11(a), (b) and (c), above, when any damage to or destruction of the environment, including without limitation land, air, water, wildlife, and vegetation, occurs with one or more trains of both NSR and WLE being involved, then, as between themselves, NSR and WLE agree that (i) NSR shall be solely responsible for any damage or destruction to the environment and to third parties which results solely from a substance transported in NSR equipment from which there was a release, (ii) WLE shall be solely responsible for any damage or destruction to the environment and to third parties which results solely from a substance transported in WLE equipment from which there was a release, and (iii) NSR and WLE shall be responsible, in proportion to the total number of pieces of NSR equipment and WLE equipment from which there was a release, for any damage or destruction to the environment and to third parties which results solely from one or more substances transported in both NSR equipment and WLE equipment from which there was a release.

(e) Whenever any liability, cost, or expense is assumed by or apportioned to a party hereto under the foregoing provisions, that party shall forever protect, defend, indemnify, and save harmless the other party to this Agreement and its directors,

officers, agents, and employees from and against that liability, cost, and expense assumed by that party or apportioned to it regardless of whether caused in whole or in part by the fault, failure, negligence, misconduct, malfeasance or misfeasance of the indemnified party or its directors, officers, agents or employees.

(f) The parties hereto agree that each and all of its indemnity commitments in this Agreement in favor of the other party hereto shall also extend to and indemnify their respective parent corporations, subsidiaries and affiliates, and all of their respective directors, officers, agents and employees.

(g) In every case of death or injury suffered by an employee of a party hereto, when compensation to such employee or employee's dependents is required to be paid under any workmen's compensation, occupational disease, employer's liability, or other law, and a party under the provisions of this Agreement is required to pay said compensation, if such compensation is required to be paid in installments over a period of time, such party shall not be released from paying any such future installments by reason of the expiration or other termination of this Agreement prior to any of the respective dates upon which any such future installments are to be paid.

(h) Each of WLE and NSR shall indemnify and hold harmless the other party hereto against any and all costs and payments, including benefits, allowances, and arbitration, administrative and litigation expenses, arising out of lawsuits, claims or grievances brought by or on behalf of its own employees or their collective bargaining representatives, either pursuant to employee protective conditions imposed by a governmental agency upon the agency's approval or exemption of this Agreement and operations hereunder or pursuant to a collective bargaining agreement. It is the

intention of the parties hereto that WLE and NSR each shall bear the full costs of protection of its own employees under employee protective conditions that may be imposed, and of grievances filed by its own employees arising under its collective bargaining agreements with its employees. Similarly, each party hereto agrees to indemnify and hold harmless the other party against any and all costs and payments, including judgments, damages, attorneys' fees and litigation expenses, arising out of claims, lawsuits and actions brought by or on behalf of its own employees pursuant to any provision of law, including common law, and based on employment arising out of the operations covered by this Agreement, except to the extent otherwise specifically provided in this Agreement.

(i) If any employee of NSR shall neglect, refuse or fail to abide by WLE's rules, instructions and restrictions governing the operation on or along the Subject Trackage, such employee shall upon written request of WLE, be prohibited by NSR from working on the Subject Trackage. If any party shall deem it necessary to hold a formal investigation to establish such neglect, refusal or failure on the part of any employee of NSR, then upon such notice presented in writing, NSR shall promptly hold an investigation in which all parties concerned shall participate and bear the expense for its officers, counsel, witnesses and employees. Notice of such investigations to a NSR employee shall be given by NSR officers, and such investigation shall be conducted in accordance with the terms and conditions of schedule agreements between NSR and its employees. If the result of such investigation warrants, such employee shall, upon written request by WLE, be withdrawn by NSR from service on WLE's property, and

NSR shall release and indemnify WLE from and against any and all claims and expenses because of such withdrawal.

(j) Each party shall assume and bear all responsibility for such loss, damage, injury and death caused by acts or omissions of any of its employees while under the influence of drugs or alcohol and Section 11(a), (b) and (c) shall not apply.

(k) For the purposes of assigning responsibility for loss or damage under this Section 11 as between the parties hereto, the trains, cars, and equipment of a railroad other than NSR and WLE shall be considered to be the trains, cars and equipment of WLE.

## **SECTION 12. INVESTIGATION**

(a) Each party shall investigate, adjust, and defend all cargo related claim liability filed with it in accordance with 49 U.S.C. Section 11706 or 49 C.F.R. Section 1005, or in accordance with any applicable transportation contract filed pursuant to 49 U.S.C. 10709.

(b) In the event a claim or suit is asserted against one of the parties hereto which is the other party's duty to investigate, adjust or defend, then, unless otherwise agreed, such other party shall, upon request, take over the investigation, adjustment, and defense of such claim or suit.

(c) All costs and expenses in connection with the investigation, adjustment, and defense of any claim or suit shall be included as costs and expenses in applying the liability provisions set forth herein, except that salaries or wages of full-time



employees of any party, including claim agents and attorneys, engaged directly or indirectly in such work shall be borne by the employing party.

(d) Excluding cargo related claim liability filed in accordance with 49 U.S.C. 11706 or 49 C.F.R. Section 1005, or in accordance with any applicable transportation contract filed pursuant to 49 U.S.C. Section 10709, no party hereto shall settle or compromise any claim, demand, suit or cause of action for which the other party has any liability hereunder without the concurrence of such other party if the consideration for such settlement exceeds Thirty-Five Thousand Dollars (\$35,000.00).

### **SECTION 13. TERM**

(a) This Agreement shall become effective on the date first appearing above, and following the expiration of any time periods required by the issuance of labor notices by WLE, if any (the "Effective Date" herein), and shall remain in full force and effect for a period of twenty-five (25) years. The Effective Date of this Agreement shall be confirmed by an exchange of correspondence between the appropriate operating officers of the parties hereto.

(b) Termination of this Agreement shall not relieve or release either party hereto from any liability it may have incurred or any obligation which may have accrued under any provision of this Agreement prior to said termination.

(c) The twenty-five (25) year term set forth in Section 13(a) relates solely to this Agreement's terms and conditions, and not the underlying right of movement. The parties intend that the underlying right of movement, the trackage rights itself, will be

governed by the principles found in Thompson v. Texas Mexican Ry., 328 U.S. 34, 145 (1946).

#### **SECTION 14. ABANDONMENT**

WLE may abandon the Subject Trackage. In the event regulatory authority is required to effect such abandonment, NSR will not interfere with WLE's actions to seek and to exercise such authority. In the event regulatory authority is required for NSR to discontinue its own operations over the Subject Trackage, NSR will seek and diligently pursue such regulatory authority at the same time that WLE seeks regulatory authority to abandon the Subject Trackage, or as soon thereafter as NSR may do so in accordance with applicable statutes and regulations, unless NSR intends to acquire the Subject Trackage from WLE pursuant to 49 U.S.C. Section 10904 or other similar provision. Unless NSR or another party acquires the Subject Trackage for continued rail use, NSR shall exercise its authority to discontinue its operations pursuant to this Agreement upon the date established by WLE for abandonment of the Subject Trackage, or upon the earliest authorized date of exercise of the regulatory authority to discontinue operations, whichever is later. If regulatory authority for discontinuance of NSR's operation is not required, NSR shall discontinue its operations hereunder on the date that WLE is authorized to abandon the Subject Trackage. Upon discontinuance of NSR's operations, this Agreement shall terminate and be of no further force and effect, except that termination of this Agreement shall not relieve or release either party hereto from any obligations assumed or from any liability which may have arisen or been

incurred prior to said termination. As used in this Section 14, Subject Trackage means the entire Subject Trackage or any portion or portions thereof.

#### **SECTION 15. GENERAL PROVISIONS**

(a) This Agreement and each and every provision hereof are for the exclusive benefit of the parties hereto and not for the benefit of any third party. Nothing contained herein shall be taken as creating or increasing any right in any third party or parties to recover by way of damages or otherwise against any of the parties hereto.

(b) All Section headings are inserted for convenience only and shall not affect any construction or interpretation of this Agreement.

(c) This Agreement and the attachments annexed hereto and integrated herewith contain the entire agreement between the parties hereto containing the subject matter hereof, and supersede any and all oral or verbal understandings between said parties.

(d) No term or provision of this Agreement may be changed, waived, discharged, or terminated except by an Instrument in writing signed by the parties hereto.

(e) NSR shall not assign or transfer this Agreement or any of its rights hereunder to any person, firm or corporation without obtaining the prior written consent of WLE, which such consent may be given or withheld at WLE's sole discretion.

(f) For the purpose of this Agreement, the cars and equipment (and any employees, passengers and property contained therein) in the revenue waybill account of one of the parties hereto, while being moved upon or over the Subject Trackage

shall, as between the parties hereto, be deemed to be the cars, equipment, employees, passengers and property of that party hereto. As to all other trains, locomotives, cars and equipment, as between the parties hereto, said trains, locomotives, cars, equipment, employees, passengers and property that are under the control of a party hereto shall be deemed to be the trains, locomotives, cars, equipment, employees, passengers and property of that party.

(g) All words, terms, and phrases used in this Agreement shall be construed in accordance with the generally applicable definition or meaning of such words, terms and phrases in the railroad industry.

#### **SECTION 16. ARBITRATION**

(a) In the event of any dispute, claim, question, or disagreement arising from or relating to this Agreement or the breach thereof, the parties hereto shall use their best efforts to settle the dispute, claim, question, or disagreement. To this effect, they shall consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to both parties. If they do not reach such solution within a period of sixty (60) days, then, upon notice by either party to the other, all disputes, claims, questions, or differences shall be finally settled by arbitration administered by the American Arbitration Association. The American Arbitration Association shall apply the provisions of its Commercial Arbitration Rules as most recently published on or before the date of this Agreement, except to the extent they conflict with a provision of this Section 16.

(b) Within fifteen (15) days after the commencement of arbitration, each party shall select one person to act as arbitrator, and the two selected shall select a third

arbitrator within ten (10) days of their appointment. If the arbitrators selected by the parties are unable or fail to agree upon the third arbitrator, the third arbitrator shall be selected by the American Arbitration Association. Each arbitrator shall have knowledge of the railroad industry.

(c) To the extent possible, the two parties shall agree on common elements of a proposed solution to the dispute at hand. Each party shall submit to the arbitrator and exchange with each other in advance of the hearing their last, best offers, with regard to the elements of a proposed solution to the dispute at hand that build upon the common elements already agreed upon. The arbitrators shall be limited to awarding only one or the other of the two offers submitted.

(d) The arbitrators will have no authority to award punitive damages or any other damages not measured by the prevailing party's actual damages, and may not, in any event, make any ruling, finding or award that does not conform to the terms and conditions of this Agreement.

(e) Neither party nor the arbitrators may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties.

(f) The arbitration proceedings shall be conducted in Washington, D.C.

(g) In rendering the award, the arbitrator shall determine the rights and obligations of the parties according to the substantive and procedural laws of Delaware.

## **SECTION 17. NOTICE**

Any notice required or permitted to be given by one party to the other under this Agreement shall be deemed given on the date sent by certified mail, or by such other means as the parties may mutually agree, and shall be addressed as follows:

(a) If to WLE:

c/o President  
Wheeling & Lake Erie Railway Company  
100 East First Street  
Brewster, OH 44613

(b) If to NSR:

c/o Executive Vice President-Operations  
Norfolk Southern Railway Company  
Three Commercial Place  
Norfolk, VA 23510-2191

With copy to:

c/o Senior Director Joint Facilities  
Norfolk Southern Railway Company  
1200 Peachtree Street  
Atlanta, GA 30309

Each party may provide changes in its address to the other party by the means specified above.

*[Remainder of Page Intentionally Blank – Signature Page Follows]*

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the day and year first above written.

WITNESS:

WHEELING & LAKE ERIE RAILWAY  
COMPANY

\_\_\_\_\_

By: \_\_\_\_\_

As to WLE.

President

WITNESS:

NORFOLK SOUTHERN RAILWAY COMPANY

\_\_\_\_\_

By: \_\_\_\_\_

As to NSR.

Executive Vice President-Operations

**THIS TRACKAGE RIGHTS AGREEMENT, entered into as of this 28th day of March, 2011, by and between WHEELING & LAKE ERIE RAILWAY COMPANY (hereinafter referred to as "WLE"), and NORFOLK SOUTHERN RAILWAY COMPANY (hereinafter referred to as "NSR").**

**WHEREAS, Norfolk Southern Corporation ("NSC"), parent to NSR, entered into a Transaction Agreement (the "Transaction Agreement") among NSC and CSX Transportation, Inc. ("CSXT"), a wholly-owned subsidiary of CSX Corporation ("CSX"); NSR; Conrail Inc. ("CRR"); Conrail, a wholly-owned subsidiary of CRR; and CRR Holdings LLC;**

**WHEREAS, CSX and NSC have indirectly acquired all the outstanding capital stock of CRR;**

**WHEREAS, the parties hereto entered into a "Settlement Agreement", addressing certain issues related to the acquisition of the outstanding capital stock of CRR, and implementing and satisfying certain conditions imposed by the Surface Transportation Board ("STB") in connection with its approval of the Transaction Agreement, including the grant by NSR to WLE of basic (single train) and expanded (unlimited train) trackage rights between Bellevue, Ohio and Toledo, Ohio; and**

**WHEREAS, the parties hereto submitted the Settlement Agreement to the STB for approval under STB Finance Docket No. 33388 (Sub-No. 95) on August 6, 2004; and**

**WHEREAS, the STB served a decision on January 26, 2005 approving the Settlement Agreement, including WLE's acquisition of trackage rights over NSR between Bellevue, Ohio and Toledo, Ohio; and**

**WHEREAS, the parties hereto desire to enter into this Agreement to implement the referenced basic trackage rights; and**



WHEREAS, the parties, to implement portions of the Settlement Agreement, by separate agreement of this date, have entered a back up haulage agreement; and

WHEREAS, the parties desire to reaffirm and acknowledge the continued effectiveness of those portions of the Settlement Agreement (including but not limited to the expanded trackage rights) that are not herein effectuated through this Agreement, and

WHEREAS, the operations dealt with hereinafter have been conducted pursuant to authorization of the Surface Transportation Board, January 26, 2005, in F.D. 33388 (Sub-No. 95).

NOW, THEREFORE, the parties hereto, intending to be legally bound, agree as follows:

#### **SECTION 1. GRANT OF TRACKAGE RIGHTS**

Subject to the terms and conditions herein provided, NSR hereby grants to WLE the right to operate its trains, locomotives, cars and equipment with its own crews, in its own account (hereinafter referred to as "Trackage Rights") over the following segments of NSR's railroad shown on the plan attached hereto, made a part hereof and marked Exhibit "I" (hereinafter referred to as the "Subject Trackage"):

- NS Lake Shore Connection (from W&LE Connection to connection with NS Bellevue/Fort Wayne Line at Bellevue) – Mileposts LS248.24 to LS249.90 – 1.66 Miles;
- NS Bellevue to Toledo (from Connection with NS Bellevue/Ft. Wayne Line to Ironville) – Mileposts T53.1 to T5.37 – 47.73 Miles
- NS Cherry Street Branch Toledo (from Ironville to east end of Toledo Pivot Bridge) – Milepost CS3.68 to CS3.0 – 0.68 miles

- NS Cherry Street Branch Toledo (from west end of Toledo Pivot Bridge to Manhattan Junction) – Mileposts CS2.65 to CS2.3 – 0.35 miles
- Turning Operation at Bellevue to connect from NS Lake Shore Connection to NS Bellevue to Toledo Line
- Bellevue/Fort Wayne Line (from Lake Shore Connection to Milepost B251.0 and Mileposts B248.4 to B251.0) – 2.6 miles
- NS Columbus/Sandusky Line (from connection with Bellevue/Fort Wayne Line to Milepost S93.0 Mileposts S95.4 to S93.0) – 2.4 miles
- Columbus/Sandusky Line (to connect with Bellevue/Fort Wayne Line Mileposts S95.4 to S95.9) – 0.5 miles
- Bellevue/Fort Wayne Line (to connect to Bellevue to Toledo Line Mileposts B248.6 to B248.4) – 0.2 miles

## **SECTION 2. USE OF SUBJECT TRACKAGE**

(a) WLE's use of the Subject Trackage shall be in common with NSR and any other user of the Subject Trackage, and NSR's right to use the Subject Trackage shall not be diminished by this Agreement.

(b) WLE shall have bridge rights only between the endpoints of the Subject Trackage. WLE shall not perform any local freight service whatsoever at any point located on the Subject Trackage.

(c) NSR shall have exclusive control of the management and operation of the Subject Trackage. WLE shall not have any claim against NSR for liability on account of loss or damage of any kind in the event the use of the Subject Trackage by WLE is interrupted or delayed at any time from any cause.

(d) WLE shall have the right to operate in either direction over the Subject Trackage.

(e) Except as may otherwise be provided by this Agreement, WLE shall not use any part of the Subject Trackage for the purpose of switching, storage or servicing cars or equipment, or the making or breaking up of trains, except that nothing contained herein, upon prior approval of NSR, shall preclude the emergency use by WLE of such auxiliary Subject Trackage as may be designated by NSR for such purposes.

(f) WLE will not permit or admit any third party to the use of all or any portion of the Subject Trackage, nor under the guise of doing its business, contract or make any agreement to handle as its own trains, locomotives, cabooses or cars over or upon the Subject Trackage, or any portion thereof, the trains, locomotives, cabooses or cars of any such third party which in the normal course of business would not be considered the trains, locomotives, cabooses or cars of WLE, or in any other way provide haulage service to others on or over the Subject Trackage

(g) WLE's use of the Subject Trackage pursuant to this Agreement shall be restricted to one train per day in each direction, without restriction as to commodity.

### **SECTION 3. MISCELLANEOUS SPECIAL PROVISIONS**

(a) When operating over the Subject Trackage, WLE's locomotives and crews will be equipped by WLE at WLE's sole expense with all communication equipment normally used by NSR in directing train movements on the Subject Trackage.

(b) Procedures for qualification and occupancy of the Subject Trackage will be arranged by the local supervision of each carrier, but any expense incurred by NSR to qualify WLE crews shall be borne by WLE. All control and usage will be subject to the approval of NSR's representative or his designee.

(c) Before WLE's locomotives enter onto the Subject Trackage, WLE shall ascertain that the Subject Trackage is clear and shall await confirmation from NSR's

designated representative that such permission has been issued to allow WLE's movements on or over the Subject Trackage. Upon completing its operations and clearing the Subject Trackage, WLE will notify NSR's designated representative that it has completed its operations and that its equipment has cleared the Subject Trackage. Once WLE has notified NSR's representative that it has cleared the Subject Trackage, WLE shall not reenter the Subject Trackage without again obtaining permission from NSR's representative. When operating over the Subject Trackage, WLE's locomotives and crews will be equipped by WLE at WLE's sole expense, with all communication equipment normally used by NSR in directing train movements on the Subject Trackage.

(d) NSR shall have the right to exclude from its tracks any employee of WLE determined to be in violation of, or who shall refuse to abide by, NSR rules, regulations, orders, practices, or instructions issued by NSR timetable or otherwise. WLE shall release, indemnify, defend, and save harmless NSR and its parent corporation, subsidiaries and affiliates and all of their respective directors, officers, agents and employees from and against any and all claims and expenses resulting from such exclusion.

#### SECTION 4. COMPENSATION

(a) The Current Charge to be paid by WLE for the Trackage Rights covered by this Agreement shall be [REDACTED] per car mile. As compensation for the trackage rights, WLE will pay to NSR a sum computed by multiplying (i) the Current Charge specified in this Section 4 by (ii) the number of rail cars (loaded or empty) moved by WLE over the Subject Trackage by (iii) the number of miles between the endpoints of the Subject Trackage as specified in Section 1 hereof, which for the purposes of this Agreement shall be considered to be 56.12 miles. For purposes of this Agreement, each railroad freight car (including standard flat cars not exceeding ninety-six (96) feet in length), locomotive, caboose or other equipment furnished in substitution of railroad equipment, loaded or empty, shall

count as a single rail car. Each articulated freight car shall be counted as one (1) rail car per platform or well of the articulated freight car. A single unit of RoadRailer® equipment (or comparable bimodal freight handling equipment) shall count as one half (1/2) of a rail car. A single unit of Coltainer® equipment, loaded or empty, defined as "an eighty-six (86) foot flat car containing up to four (4) demountable containers, each holding up to twenty-five (25) tons of lading, primarily coal or related commodities," shall count as one (1) rail car. The Current Charge shall be subject to change to reflect any increase or decrease subsequent to the Effective Date of this Agreement in labor, material and other costs, as more fully set forth below.

(b) WLE shall submit a monthly payment to NSR; said payment shall include a statement which shall list the number of cars operated by WLE over the Subject Trackage for WLE's previous month's use of the Subject Trackage, computed in accordance with this Section 4.

(c) The Current Charge set forth in Section 4 (a) hereof shall be revised upward or downward each year, beginning with the bill rendered for the month of July first following the "Effective Date" of this Agreement, to compensate for the increase or decrease in the cost of labor and material, excluding fuel, as reflected in the Annual Indexes of Chargeout Prices and Wage Rates (1977=100), included in "AAR Railroad Cost Indexes" and supplements thereto, issued by the Association of American Railroads ("AAR"). In making such determination, the Final "Material prices, wage rates and supplements combined (excluding fuel)" indexes for the East District shall be used. The Current Charge shall be revised by calculating the percent of increase or decrease in the index for the latest calendar year as related to the index for the previous calendar year and applying that percentage to the Current Charge.

(d) In the event the base for the Annual Indexes of Charge-Out Prices and Wage Rates issued by the AAR shall be changed from the year 1977 appropriate revision shall be made. If the AAR or any successor organization discontinues

publication of the Annual Indexes of Charge-Out Prices and Wage Rates, an appropriate substitute for determining the percentage of increase or decrease shall be negotiated by the parties hereto. In the absence of agreement, the parties shall submit the matter to binding arbitration under terms of Section 16 of this Agreement.

(e) Under no circumstances shall the Current Charge paid to NSR by WLE be less than the Current Charge set forth in Section 4(a) hereof.

#### **SECTION 5. PAYMENT OF BILLS**

(a) All payments called for under this Agreement shall be made within thirty (30) days after the date of the bills therefor. No payments shall be withheld because of any dispute as to the correctness of items in the bills rendered, and any discrepancies reconciled between the parties hereto shall be adjusted in the accounts of a subsequent month. The records of each party hereto, insofar as they pertain to matters covered by this Agreement, shall be open at all reasonable times to inspection by the other party for a period of three (3) years from the date of billing.

(b) Bills rendered pursuant to the provisions of this Agreement, other than those provided for in Section 4, shall include direct labor and material costs, together with the surcharges, overhead percentages and equipment rentals as specified by NSR at the time any work is performed by NSR for WLE or shall include actual costs and expenses, upon mutual agreement of the parties.

#### **SECTION 6. MAINTENANCE AND OPERATIONS**

(a) NSR shall, at its own expense, and with its own supervision and labor, maintain, repair, renew, and operate the Subject Trackage, provided, however, that NSR need not maintain, repair or renew the Subject Trackage to any better condition than it is in as of the Effective Date, reasonable wear and tear excepted.

(b) WLE shall not by reason of failure or neglect on the part of NSR hereto to maintain, repair, or renew the respective ownership segments of the Subject Trackage, have or make any claim against NSR, or its respective directors, officers, agents or employees for any injury to or death of any person or persons whomsoever, or for any damage to or loss or destruction of any property whatsoever, or for any damages of any nature suffered by a party resulting from any such failure or neglect.

(c) If by reason of any mechanical failure or for any other cause not resulting from an accident or derailment, a train, locomotive or equipment of WLE becomes stalled or unable to proceed under its own power, or if in emergencies crippled or otherwise defective cars are set out of WLE's trains on the Subject Trackage, NSR shall furnish motive power or such other assistance as may be necessary to haul, help, or push such trains, locomotives, or cars, or to properly move the disabled equipment off the Subject Trackage. For such service, WLE shall pay NSR a reasonable charge therefor, which shall be in accordance with NSR's Schedule of Surcharges and Rates for Billings to U.S. Railroads and which shall be comparable to the rate schedules of U.S. Class I Railroads.

(d) If it becomes necessary to make repairs to or adjust or transfer the lading of such crippled or defective cars in order to move them off the Subject Trackage, such work shall be done by NSR. For such service, WLE shall pay NSR a reasonable charge therefor, which shall be in accordance with NSR's Schedule of Surcharges and Rates for Billings to U.S. Railroads and which shall be comparable to the rate schedules of U.S. Class I Railroads.

## **SECTION 7. MILEAGE AND CAR HIRE**

All mileage and car hire charges accruing on cars in each party's trains on the Subject Trackage shall be assumed by that party and reported and paid by that party directly to the owner of such cars.

**SECTION 8. CLEARING OF WRECKS**

Whenever use of the Subject Trackage requires rerailing, wrecking service or wrecking train service, NSR shall arrange for such service, including the repair and restoration of roadbed, track, and structures. The cost and expense thereof, including without limitation, loss of, damage to, and destruction of any property whatsoever and injury to or death of any person or persons whomsoever resulting therefrom, shall be apportioned in accordance with the provisions of Section 11 hereof. All locomotives, cars, and equipment and salvage from the same so picked up and removed which are owned by or under the management and control or used by a party at the time of such wreck shall be promptly delivered to it.

**SECTION 9. ADDITIONS TO AND/OR RETIREMENTS**

(a) The cost and expense of future additions or changes shall be borne by the party or parties for whose benefit they are made. However, any changes required, subsequent to the Effective Date hereof, by any public authority shall be borne by the parties hereto in proportion to the parties' usage over the affected location, as measured by usage during the twelve (12) month period after the addition or change is put into service. Nothing in this Section 9(a) shall be interpreted as expressing an intention of either party to request or consent to any future additions or changes.

(b) In accordance with the provisions of Section 14, NSR shall have the right to retire and eliminate all or part of the Subject Trackage. All costs and expenses relating to removal of track, associated track appurtenances, signals and related facilities necessary to effect abandonment, discontinuance or complete withdrawal of either party shall be at the sole cost and expense of said party.

**SECTION 10. MAINTENANCE OF CONNECTIONS**



All existing connections or facilities which are jointly used by the parties hereto under existing agreements or practices shall continue to be maintained, repaired, and renewed by and at the expense of the party or parties responsible for such maintenance, repair, and renewal under such agreements or practices.

#### SECTION 11. LIABILITY

The responsibility of the parties hereto as among themselves for loss of, damage to, or destruction of any property whatsoever, or injury to or death of any person or persons whomsoever, or any damage to or destruction of the environment whatsoever, including without limitation land, air, water, wildlife, and vegetation resulting from, arising out of, incidental to, or occurring in connection with this Agreement, shall be determined as follows:

(a) Whenever any loss of, damage to, or destruction of any property whatsoever, or injury to or death of any person or persons whomsoever, or any damage to or destruction of the environment whatsoever, including without limitation land, air, water, wildlife and vegetation, occurs with the trains, locomotives, cars, or equipment of, or in the account of, one party hereto being involved, without the trains, locomotives, cars or equipment of, or in the account of, the other party hereto being involved, such involved party shall assume all liability therefor and bear all cost and expense in connection therewith and shall forever protect, defend, indemnify, and hold harmless the other party hereto, its parent and subsidiaries, and each of their respective directors, officers, agents, and employees from and against any such liability, cost and expense.

(b) Whenever any loss of, damage to, or destruction of any property whatsoever, or injury to or death of any person or persons whomsoever, or any damage to or destruction of the environment whatsoever, including without limitation land, air, water, wildlife, and vegetation, occurs with the trains, locomotives, cars or equipment of, or in the account of, both NSR and WLE being involved, each shall separately assume and bear all liability, cost, and expense for loss of and damage to said trains,

locomotives, cars (including without limitation lading), and equipment operated by each of them and for injury to and death of each of their respective directors, officers, agents, and employees (including sole employees), and persons in each of their care and custody. All liability, cost, and expense for injury to and death of any other person or persons whomsoever, and for loss of, damage to, and destruction of all other property (including without limitation the Subject Trackage) so occurring shall be borne equally by such parties involved.

(c) Whenever any loss of, damage to, or destruction of any property whatsoever, or injury to or death of any person or persons whomsoever, or any damage to or destruction of the environment whatsoever, including without limitation land, air, water, wildlife, and vegetation, occurs without the trains, locomotives, cars, or equipment of, or in the account of, any party hereto being involved, or if it cannot be determined which party's or parties' trains, locomotives, cars or equipment are involved, each party hereto shall separately assume and bear all liability, cost, and expense for injury to and death of each of their directors, officers, agents, and employees (including sole employees), and persons in each of their care and custody, and all liability, cost, and expense for injury to and death of any other person or persons whomsoever, and for loss of, damage to, and destruction of all other property (including without limitation the Subject Trackage) so occurring shall be borne equally by the parties hereto.

(d) Notwithstanding anything to the contrary in Sections 11(a), (b) and (c), above, when any damage to or destruction of the environment, including without limitation land, air, water, wildlife, and vegetation, occurs with one or more trains of both NSR and WLE being involved, then, as between themselves, NSR and WLE agree that (i) NSR shall be solely responsible for any damage or destruction to the environment and to third parties which results solely from a substance transported in NSR equipment from which there was a release, (ii) WLE shall be solely responsible for any damage or destruction to the environment and to third parties which results solely from a substance transported in WLE equipment from which there was a release, and (iii) NSR and WLE shall be responsible, in proportion to the total number of pieces of NSR equipment and

WLE equipment from which there was a release, for any damage or destruction to the environment and to third parties which results solely from one or more substances transported in both NSR equipment and WLE equipment from which there was a release. For purposes of this Subsection 11(d), "WLE equipment" shall mean railcars in the account of WLE, and "NSR equipment" shall mean railcars in the account of NSR.

(e) Whenever any liability, cost, or expense is assumed by or apportioned to a party hereto under the foregoing provisions, that party shall forever protect, defend, indemnify, and save harmless the other party to this Agreement and its directors, officers, agents, and employees from and against that liability, cost, and expense assumed by that party or apportioned to it regardless of whether caused in whole or in part by the fault, failure, negligence, misconduct, malfeasance or misfeasance of the Indemnified party or its directors, officers, agents or employees.

(f) The parties hereto agree that each and all of its Indemnity commitments in this Agreement in favor of the other party hereto shall also extend to and indemnify their respective parent corporations, subsidiaries and affiliates, and all of their respective directors, officers, agents and employees.

(g) In every case of death or injury suffered by an employee of a party hereto, when compensation to such employee or employee's dependents is required to be paid under any workmen's compensation, occupational disease, employer's liability, or other law, and a party under the provisions of this Agreement is required to pay said compensation, if such compensation is required to be paid in installments over a period of time, such party shall not be released from paying any such future installments by reason of the expiration or other termination of this Agreement prior to any of the respective dates upon which any such future installments are to be paid.

(h) Each of WLE and NSR shall indemnify and hold harmless the other party against any and all costs and payments, including benefits, allowances, and arbitration, administrative and litigation expenses, arising out of lawsuits, claims or grievances

brought by or on behalf of its own employees or their collective bargaining representatives, either pursuant to employee protective conditions imposed by a governmental agency upon the agency's approval or exemption of this Agreement and operations hereunder or pursuant to a collective bargaining agreement. It is the intention of the parties hereto that WLE and NSR each shall bear the full costs of protection of its own employees under employee protective conditions that may be imposed, and of grievances filed by its own employees arising under its collective bargaining agreements with its employees. Similarly, each party hereto agrees to indemnify and hold harmless the other party against any and all costs and payments, including judgments, damages, attorneys' fees and litigation expenses, arising out of claims, lawsuits and actions brought by or on behalf of its own employees pursuant to any provision of law, including common law, and based on employment arising out of the operations covered by this Agreement, except to the extent otherwise specifically provided in this Agreement.

(i) If any employee of WLE shall neglect, refuse or fail to abide by NSR's rules, instructions and restrictions governing the operation on or along the Subject Trackage, such employee shall upon written request of NSR, be prohibited by WLE from working on the Subject Trackage. If any party shall deem it necessary to hold a formal investigation to establish such neglect, refusal or failure on the part of any employee of WLE, then upon such notice presented in writing, WLE shall promptly hold an investigation in which all parties concerned shall participate and bear the expense for its officers, counsel, witnesses and employees. Notice of such investigations to a WLE employee shall be given by WLE officers, and such investigation shall be conducted in accordance with the terms and conditions of schedule agreements between WLE and its employees. If the result of such investigation warrants, such employee shall, upon written request by NSR, be withdrawn by WLE from service on NSR's property, and WLE shall release and indemnify NSR from and against any and all claims and expenses because of such withdrawal.

(j) Each party shall assume and bear all responsibility for such loss, damage, injury and death caused by acts or omissions of any of its employees while under the influence of drugs or alcohol and Section 11(a), (b) and (c) shall not apply.

(k) For the purposes of assigning responsibility for loss or damage under this Section 11 as between the parties hereto, the trains, cars and equipment of a railroad other than NSR and WLE shall be considered to be the trains, cars and equipment of NSR.

## **SECTION 12. INVESTIGATION**

(a) Each party shall investigate, adjust, and defend all cargo related claim liability filed with it in accordance with 49 U.S.C. Section 11706 or 49 C.F.R. Section 1005, or in accordance with any applicable transportation contract filed pursuant to 49 U.S.C. 10709.

(b) In the event a claim or suit is asserted against one of the parties hereto which is the other party's duty to investigate, adjust or defend, then, unless otherwise agreed, such other party shall, upon request, take over the investigation, adjustment, and defense of such claim or suit.

(c) All costs and expenses in connection with the investigation, adjustment, and defense of any claim or suit shall be included as costs and expenses in applying the liability provisions set forth herein, except that salaries or wages of full-time employees of any party, including claim agents and attorneys, engaged directly or indirectly in such work shall be borne by the employing party.

(d) Excluding cargo related claim liability filed in accordance with 49 U.S.C. 11706 or 49 C.F.R. Section 1005, or in accordance with any applicable transportation contract filed pursuant to 49 U.S.C. Section 10709, no party shall settle or compromise any claim, demand, suit or cause of action for which the other party has any liability

hereunder without the concurrence of such other party if the consideration for such settlement exceeds Thirty-Five Thousand Dollars (\$35,000.00).

**SECTION 13. TERM**

(a) This Agreement shall become effective on the date first appearing above, and following the expiration of any time periods required by the issuance of labor notices by NSR, if any, (the "Effective Date") herein) and shall remain in full force and effect for a period of twenty-five (25) years. The Effective Date of this Agreement shall be confirmed by letter agreement signed by NSR and WLE. WLE may terminate this Agreement upon three hundred sixty-five (365) days written notice to NSR.

(b) This Agreement and WLE's related underlying right of movement shall immediately terminate upon occurrence of any of the following:

- (i) The acquisition of control of WLE by another rail carrier or a "Carrier Interest" , which is defined as another rail carrier, or an officer(s), partner(s), manager(s) or other person or party that controls or is controlled by another rail carrier.
- (ii) The joint acquisition of control of WLE and any other rail carrier, including but not limited to the entering into by WLE of a partnership, a limited liability company, or any other business arrangement of like kind.
- (iii) The acquisition of any of WLE's limited or general partnership interests, except that any acquisition by WLE of any limited partnership interest in WLE will not cause termination of this Agreement.
- (iv) The acquisition of all or substantially all of WLE or its business or assets by a Carrier Interest.

(c) Notwithstanding the foregoing, NSR and WLE agree that the following events will not result in termination of this Agreement:

(i) WLE may receive an infusion of capital (with an associated issuance of equity interest in WLE) provided the infusion and associated issuance of equity interest does not result in a change of control resulting in another Carrier Interest controlling, or jointly controlling, WLE.

(ii) WLE may purchase a Class III rail carrier or all or substantially all of the assets of a Class III rail carrier.

(d) Termination of this Agreement shall not relieve or release either party hereto from any liability it may have incurred or any obligation which may have accrued under any provision of this Agreement prior to said termination.

(e) The twenty-five (25) year term set forth in Section 13(a) relates solely to this Agreement's terms and conditions, and not the underlying right of movement. The parties intend that the underlying right of movement, the trackage rights itself, will be governed by the principles found in Thompson v. Texas Mexican Ry., 328 U.S. 134, 145 (1946).

(f) "Control" for the purposes of Section 13(b) and Section 13(c) shall be interpreted in a manner consistent with the Interstate Commerce Act (49 U.S.C. Section 10101, et seq.

#### **SECTION 14. ABANDONMENT**

NSR may abandon the Subject Trackage. In the event regulatory authority is required to effect such abandonment, WLE will not interfere with NSR's actions to seek and to exercise such authority. In the event regulatory authority is required for WLE to discontinue its own operations over the Subject Trackage, WLE will seek and diligently

pursue such regulatory authority at the same time that NSR seeks regulatory authority to abandon the Subject Trackage, or as soon thereafter as WLE may do so in accordance with applicable statutes and regulations, unless WLE intends to acquire the Subject Trackage from NSR pursuant to 49 U.S.C. Section 10904 or other similar provision. Unless WLE or another party acquires the Subject Trackage for continued rail use, WLE shall exercise its authority to discontinue its operations pursuant to this Agreement upon the date established by NSR for abandonment of the Subject Trackage, or upon the earliest authorized date of exercise of the regulatory authority to discontinue operations, whichever is later. If regulatory authority for discontinuance of WLE's operation is not required, WLE shall discontinue its operations hereunder on the date that NSR is authorized to abandon the Subject Trackage. Upon discontinuance of WLE's operations, this Agreement shall terminate and be of no further force and effect, except that termination of this Agreement shall not relieve or release either party hereto from any obligations assumed or from any liability which may have arisen or been incurred prior to said termination. As used in this Section 14, Subject Trackage means the entire Subject Trackage or any portion or portions thereof.

#### **SECTION-15. GENERAL PROVISIONS**

(a) This Agreement and each and every provision hereof are for the exclusive benefit of the parties hereto and not for the benefit of any other party. Nothing contained herein shall be taken as creating or increasing any right in any other party or parties to recover by way of damages or otherwise against any of the parties hereto.

(b) All Section headings are inserted for convenience only and shall not affect any construction or interpretation of this Agreement.

(c) This Agreement and the attachments annexed hereto and integrated herewith contain the entire agreement among the parties hereto containing the subject matter hereof, and supersede any and all oral or verbal understandings between said parties.



(d) No term or provision of this Agreement may be changed, waived, discharged, or terminated except by an instrument in writing signed by the parties hereto.

(e) WLE shall not assign or transfer this Agreement or any of its rights hereunder to any person, firm or corporation without obtaining the prior written consent of NSR, which such consent may be given or withheld at NSR's sole discretion.

(f) For the purpose of this Agreement, the cars and equipment (and any employees, passengers and property contained therein) in the revenue waybill account of one of the parties hereto, while being moved upon or over the Subject Trackage shall, as between the parties hereto, be deemed to be the cars, equipment, employees, passengers and property of that party hereto. As to all other trains, locomotives, cars and equipment, as between the parties hereto, said trains, locomotives, cars, equipment, employees, passengers and property that are under the control of a party hereto shall be deemed to be the trains, locomotives, cars, equipment, employees, passengers and property of that party.

(g) All words, terms, and phrases used in this Agreement shall be construed in accordance with the generally applicable definition or meaning of such words, terms and phrases in the railroad industry.

#### SECTION 16. ARBITRATION

(a) In the event of any dispute, claim, question, or disagreement arising from or relating to this Agreement or the breach thereof, the parties hereto shall use their best efforts to settle the dispute, claim, question, or disagreement. To this effect, they shall consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to both parties. If they do not reach such solution within a period of sixty (60) days, then, upon notice by

either party to the other, all disputes, claims, questions, or differences shall be finally settled by arbitration administered by the American Arbitration Association. The American Arbitration Association shall apply the provisions of its Commercial Arbitration Rules as most recently published on or before the date of this Agreement, except to the extent they conflict with a provision of this Section 16.

(b) Within fifteen (15) days after the commencement of arbitration, each party shall select one person to act as arbitrator, and the two selected shall select a third arbitrator within ten (10) days of their appointment. If the arbitrators selected by the parties are unable or fail to agree upon the third arbitrator, the third arbitrator shall be selected by the American Arbitration Association. Each arbitrator shall have knowledge of the railroad industry.

(c) To the extent possible, the two parties shall agree on common elements of a proposed solution to the dispute at hand. Each party shall submit to the arbitrator and exchange with each other in advance of the hearing their last, best offers, with regard to the elements of a proposed solution to the dispute at hand that build upon the common elements already agreed upon. The arbitrators shall be limited to awarding only one or the other of the two offers submitted.

(d) The arbitrators will have no authority to award punitive damages or any other damages not measured by the prevailing party's actual damages, and may not, in any event, make any ruling, finding or award that does not conform to the terms and conditions of this Agreement.

(e) Neither party nor the arbitrators may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties.

(f) The arbitration proceedings shall be conducted in Washington, D.C.

(g) In rendering the award, the arbitrator shall determine the rights and obligations of the parties according to the substantive and procedural laws of Delaware.

**SECTION 17. NOTICE**

Any notice required or permitted to be given by one party to the other party hereto under this Agreement shall be deemed given on the date sent by certified mail, or by such other means as the parties may mutually agree, and shall be addressed as follows:

(a) If to WLE:

c/o President  
Wheeling & Lake Erie Railway Company  
100 East First Street  
Brewster, OH 44613

(b) If to NSR:

c/o Executive Vice President - Operations  
Norfolk Southern Railway Company  
Three Commercial Place  
Norfolk, VA 23510-2191

With copy to:

c/o Senior Director Joint Facilities  
Norfolk Southern Railway Company  
1200 Peachtree St.  
Atlanta, GA 30309

Each party may provide changes in its address to the other party by the means specified above.

#### **SECTION 18. CAPACITY IMPROVEMENTS**

The parties hereto acknowledge and agree that portions of the Settlement Agreement (including but not limited to the expanded trackage rights or the consideration required to induce NS to make the necessary capacity improvements) are not implemented pursuant to this Agreement. The parties acknowledge and agree that the Settlement Agreement, to the extent not implemented by this Agreement, remains in full force and effect, to be implemented through other agreements. The expanded trackage rights shall not be implemented until NSR is satisfied in its sole discretion that NSR will not incur tax or be revenue neutral on an after-tax basis on any amounts expended by WLE or any other person to construct the necessary capacity improvements, in which case the parties shall enter into an agreement, which (1) implements the expanded rights contemplated in the Settlement Agreement on terms in all material ways (including liability and compensation for the movement of traffic) the same as those set forth in this Agreement governing the rights granted herein, and (2) addresses the capital improvements to be made to the Subject Trackage before such expanded trackage rights become effective, the allocation of the costs relating to and the source of funding for such capital improvements and the allocation of liability during the construction of such capital improvements.

#### **Section 19 GOOD FAITH AND FAIR DEALING**

The parties agree to deal with one another on matters related to this Agreement fairly, honestly, and in good faith. "Good Faith" means honesty in fact and observance of reasonable commercial standards and customs of fair dealing in the transportation industry generally and of the railroad transportation industry in particular.

**EXECUTION VERSION**

**IN WITNESS WHEREOF**, the parties hereto have caused this Agreement to be duly executed as of the day and year first above written.

**WITNESS:**

**WHEELING & LAKE ERIE RAILWAY  
COMPANY**

\_\_\_\_\_  
**As to WLE**

**By:** \_\_\_\_\_  
**President**

**WITNESS:**

**NORFOLK SOUTHERN RAILWAY COMPANY**

\_\_\_\_\_  
**As to NSR**

**By:** \_\_\_\_\_  
**Executive Vice President-Operations**

THIS TRACKAGE RIGHTS AGREEMENT, entered into as of this 28th day of March, 2011, by and between WHEELING & LAKE ERIE RAILWAY COMPANY (hereinafter referred to as "WLE"), and NORFOLK SOUTHERN RAILWAY COMPANY (hereinafter referred to as "NSR").

WHEREAS, The Cleveland, Cincinnati, Chicago and Saint Louis Railway Company (the "Big Four"), and the Receiver of The Wheeling and Lake Erie Railroad Company (the "Wheeling") entered into an agreement dated November 1, 1913 (the "1913 Agreement") providing for overhead trackage rights between Wellington, OH and a point of connection between the Big Four and the Wheeling about one and one-half mile east of Linndale Yard at a point now known as the "Knob" by way of CP Short (said route being hereinafter referred to as the "Wellington – CP Short - Knob Route"); and

WHEREAS, in 1990, the overhead trackage rights on the Wellington – CP Short - Knob Route were assigned by Norfolk & Western Railway Company, successor in interest to the Wheeling as to the Wellington-CP Short-Knob Route trackage rights, to WLE, such assignment consented to by Consolidated Rail Corporation ("Conrail"), a successor in interest to the Big Four as to the same; and

WHEREAS, in 1997, Norfolk Southern Corporation ("NSC"), parent to NSR, entered into a Transaction Agreement (the "Transaction Agreement") among NSC and CSX Transportation, Inc. ("CSXT"), a wholly-owned subsidiary of CSX Corporation ("CSX"); NSR; Conrail Inc. ("CRR"); Conrail, a wholly-owned subsidiary of CRR; and CRR Holdings LLC;

WHEREAS, pursuant to the Transaction Agreement, CSX and NSC indirectly acquired all the outstanding capital stock of CRR;

WHEREAS, subsequently, NSR became the owner of that portion of the Wellington – CP Short – Knob Route between CP Short and the Knob and CSXT became the owner of that portion of the Wellington – CP Short - Knob Route between Wellington and CP Short; and

WHEREAS, the portion of the Wellington - CP Short - Knob Route between Wellington and CP Short and the portion of the Wellington - CP Short - Knob Route between CP Short and the Knob are now no longer joined in such a manner as to permit a straight progressive move from one segment to the other; and

WHEREAS, WLE has sought or has obtained an agreement to operate, via overhead trackage rights, between Wellington and a cross-over to the NSR-operated Berea cross-over tracks for the purpose of moving traffic in its own account to or from the Berea – CP Short Route and the CP Short – Knob Route (together, the route between the Berea crossovers and the Knob via CP 190 (bypassing CP Short) shall be referred to herein as the Berea - CP 190 - Knob Route); and

WHEREAS, the parties hereto entered into a "Settlement Agreement" addressing certain issues related to the acquisition of the outstanding capital stock of CRR, and implementing and satisfying certain conditions imposed by the Surface Transportation Board ("STB") in connection with its approval of the Transaction Agreement; and

WHEREAS, one element of that Settlement Agreement was the grant by NSR to WLE of trackage rights between Berea and the Knob; and

WHEREAS, the parties hereto submitted the Settlement Agreement to the STB for approval under STB Finance Docket No. 33388 (Sub-No. 95) on August 6, 2004; and

WHEREAS, the STB served a decision on January 26, 2005 approving the Settlement Agreement, including WLE's acquisition of trackage rights over NSR between Berea and the Knob; and

WHEREAS, the parties hereto desire to terminate the 1913 Agreement, as it applies to the CP Short – Knob Route, and substitute a new agreement to cover the terms and conditions of the overhead trackage rights granted in the 1913 Agreement, but only as to movements over the Berea - CP 190 - Knob Route except as otherwise provided herein; and

WHEREAS, the operations dealt with hereinafter have been conducted pursuant to authorization of the Surface Transportation Board, January 26, 2005, in F.D. 33388 (Sub-No. 95).

NOW, THEREFORE, the parties hereto, intending to be legally bound, agree as follows:

#### **SECTION 1. GRANT OF TRACKAGE RIGHTS**

Subject to the terms and conditions herein provided, NSR hereby grants to WLE the right to operate its trains, locomotives, cars and equipment with its own crews, in its own account (hereinafter referred to as "Trackage Rights") over the



following segments of NSR's railroad shown on the plan attached hereto, made a part hereof and marked Exhibit "I" (hereinafter referred to as the "Subject Trackage"):

- Chicago Line CP194 (Berea) (Connection to CSXT) Milepost CP194.2 to CP190 (Connection to Cloggsville Line) Milepost CD 190.63 - 3.57 Miles.
- Cloggsville Line CP190 Milepost GZ493.35 to Knob (Connection to Cleveland Belt) Milepost GZ488.13/Milepost 6.7 (CB Line) (formerly Milepost CB-5.4) - 5.22 Miles for a total combined distance of 8.79 miles.

## **SECTION 2. USE OF SUBJECT TRACKAGE**

(a) WLE's use of the Subject Trackage shall be in common with NSR and any other user of the Subject Trackage, and NSR's right to use the Subject Trackage shall not be diminished by this Agreement.

(b) WLE shall have bridge rights only between the endpoints of the Subject Trackage, and only for a prior or subsequent move to/from Wellington, via the Wellington – Berea Route. WLE shall not perform any local freight service whatsoever at any point located on the Subject Trackage. WLE shall not have rights over the Subject Trackage for the purpose of moving traffic to any point on the Wellington – Berea Route, or to any off-on point on the Wellington – Berea Route, other than Wellington, regardless of whether CSXT or other party in control over all or a portion of the Wellington – Berea Route provides WLE on-off rights or other local access along that route, nor shall WLE have any rights over the Subject Trackage for the purpose of moving traffic to any point between Berea and CP Short on trackage that on the Effective Date of this Agreement is owned by CSXT.

(c) NSR shall have exclusive control of the management and operation of the Subject Trackage. WLE shall not have any claim against NSR for liability on account of loss or damage of any kind in the event the use of the Subject Trackage by WLE is interrupted or delayed at any time from any cause.

(d) WLE shall have the right to operate in either direction over the Subject Trackage.

(e) Except as may otherwise be provided by this Agreement, WLE shall not use any part of the Subject Trackage for the purpose of switching, storage or servicing cars or equipment, or the making or breaking up of trains, except that nothing contained herein, upon prior approval of NSR, shall preclude the emergency use by WLE of such auxiliary Subject Trackage as may be designated by NSR for such purposes.

(f) WLE will not permit or admit any third party to the use of all or any portion of the Subject Trackage, nor under the guise of doing its business, contract or make any agreement to handle as its own trains, locomotives, cabooses or cars over or upon the Subject Trackage, or any portion thereof, the trains, locomotives, cabooses or cars of any such third party which in the normal course of business would not be considered the trains, locomotives, cabooses or cars of WLE, or in any other way provide haulage service to others on or over the Subject Trackage.

(g) The trackage rights granted hereby are connective with any rights WLE has for movement between the Knob and Campbell Road Yard.

**SECTION 3. MISCELLANEOUS SPECIAL PROVISIONS**

(a) When operating over the Subject Trackage, WLE's locomotives and crews will be equipped by WLE at WLE's sole expense with all communication equipment normally used by NSR in directing train movements on the Subject Trackage.

(b) Procedures for qualification and occupancy of the Subject Trackage will be arranged by the local supervision of each carrier, but any expense incurred by NSR to qualify WLE crews shall be borne by WLE. All control and usage will be subject to the approval of NSR's representative or his designee.

(c) Before WLE's locomotives enter onto the Subject Trackage, WLE shall ascertain that the Subject Trackage is clear and shall await confirmation from NSR's designated representative that such permission has been issued to allow WLE's movements on or over the Subject Trackage. Upon completing its operations and clearing the Subject Trackage, WLE will notify NSR's designated representative that it has completed its operations and that its equipment has cleared the Subject Trackage. Once WLE has notified NSR's representative that it has cleared the Subject Trackage, WLE shall not reenter the Subject Trackage without again obtaining permission from NSR's representative.

(d) NSR shall have the right to exclude from its tracks any employee of WLE determined to be in violation of, or who shall refuse to abide by, NSR rules, regulations, orders, practices, or instructions issued by NSR timetable or otherwise. WLE shall release, indemnify, defend, and save harmless NSR and its parent corporation, subsidiaries and affiliates and all of their respective directors, officers,

agents and employees from and against any and all claims and expenses resulting from such exclusion.

(e) WLE acknowledges that NSR and/or CSXT use of the so-called Berea Crossover that permits WLE progressive movements between the Wellington – Berea Route and the Berea –CP 190- Knob Route is rarely used by NSR or CSXT and further that WLE will, as a result of this Agreement, become the dominant user of said Berea Crossover. WLE further acknowledges that the winter weather conditions are such that switch heaters are required on either end of said Berea Crossovers so as to permit WLE use of the same without significant NSR and/or CSXT maintenance personnel attention that would not otherwise be required in the absence of WLE's use of the same. Therefore, WLE shall pay to NSR, in addition to the compensation otherwise set forth in this Agreement, an additional \$ [REDACTED] per month plus applicable current material and labor additives (hereinafter "Heater Charge") to pay for the presence and service of switch heaters for the NSR-maintained switches at the Berea Crossover. The Heater Charge will be subject to escalation as set for in Section 4(c) and Section 4(d) of this Agreement. In addition, if NSR replaces the switch heaters at the Berea Crossover with more cost effective switch heaters in the future, the parties will recalculate the Heater Charge to reflect the lower costs needed to maintain the new switch heaters and use that amount going forward. If CSXT requests it, WLE will make reasonable arrangements with CSXT for the provision of a switch heater for the CSXT maintained switches at the Berea Crossover.

**SECTION 4. COMPENSATION**

(a) The Current Charge to be paid by WLE for the Trackage Rights covered by this Agreement shall be [REDACTED] per car mile. As compensation for the trackage rights, WLE will pay to NSR a sum computed by multiplying (i) the Current Charge specified in this Section 4 by (ii) the number of rail cars (loaded or empty) moved by WLE over the Subject Trackage by (iii) the number of miles between the endpoints of the Subject Trackage as specified in Section 1 hereof, which for the purposes of this Agreement shall be considered to be 14.32 miles. For purposes of this Agreement, each railroad freight car (including standard flat cars not exceeding ninety-six (96) feet in length), locomotive, caboose or other equipment furnished in substitution of railroad equipment, loaded or empty, shall count as a single rail car. Each articulated freight car shall be counted as one (1) rail car per every platform or well of the articulated freight car. A single unit of RoadRailer® equipment (or comparable bimodal freight handling equipment) shall count as one half (1/2) of a rail car. A single unit of Coltainer® equipment, loaded or empty, defined as "an eighty-six (86) foot flat car containing up to four (4) demountable containers, each holding up to twenty-five (25) tons of lading, primarily coal or related commodities," shall count as one (1) rail car. The Current Charge shall be subject to change to reflect any increase or decrease subsequent to the Effective Date of this Agreement in labor, material and other costs, as more fully set forth below.

(b) WLE shall submit a monthly payment to NSR; said payment shall include a statement which shall list the number of cars operated by WLE over the Subject

Trackage for WLE's previous month's use of the Subject Trackage, computed in accordance with this Section 4.

(c) The Current Charge set forth in Section 4 (a) hereof shall be revised upward or downward each year, beginning with the bill rendered for the month of July first following the "Effective Date" of this Agreement, to compensate for the increase or decrease in the cost of labor and material, excluding fuel, as reflected in the Annual Indexes of Chargeout Prices and Wage Rates (1977=100), included in "AAR Railroad Cost Indexes" and supplements thereto, issued by the Association of American Railroads ("AAR"). In making such determination, the Final "Material prices, wage rates and supplements combined (excluding fuel)" indexes for the East District shall be used. The Current Charge shall be revised by calculating the percent of increase or decrease in the index for the latest calendar year as related to the index for the previous calendar year and applying that percentage to the Current Charge.

(d) In the event the base for the Annual Indexes of Charge-Out Prices and Wage Rates issued by the AAR shall be changed from the year 1977, appropriate revision shall be made. If the AAR or any successor organization discontinues publication of the Annual Indexes of Charge-Out Prices and Wage Rates, an appropriate substitute for determining the percentage of Increase or decrease shall be negotiated by the parties hereto. In the absence of agreement, the parties shall submit the matter to binding arbitration under terms of Section 16 of this Agreement.

(e) Under no circumstances shall the Current Charge paid to NSR by WLE be less than that the Current Charge set forth in Section 4(a) hereof.

**SECTION 5. PAYMENT OF BILLS**

(a) All payments called for under this Agreement shall be made within thirty (30) days after the date of the bills therefor. No payments shall be withheld because of any dispute as to the correctness of Items in the bills rendered, and any discrepancies reconciled between the parties hereto shall be adjusted in the accounts of a subsequent month. The records of each party hereto, insofar as they pertain to matters covered by this Agreement, shall be open at all reasonable times to inspection by the other party for a period of three (3) years from the date of billing.

(b) Bills rendered pursuant to the provisions of this Agreement, other than those provided for in Section 4, shall include direct labor and material costs, together with the surcharges, overhead percentages and equipment rentals as specified by NSR at the time any work is performed by NSR for WLE or shall include actual costs and expenses, upon mutual agreement of the parties.

**SECTION 6. MAINTENANCE AND OPERATIONS**

(a) NSR shall, at its own expense, and with its own supervision and labor, maintain, repair, renew, and operate the Subject Trackage, provided, however, that NSR need not maintain, repair or renew the Subject Trackage to any better condition than it is in as of the Effective Date, reasonable wear and tear excepted.

(b) WLE shall not by reason of failure or neglect on the part of NSR hereto to maintain, repair, or renew the respective ownership segments of the Subject Trackage, have or make any claim against NSR, or its respective directors, officers, agents or employees for any injury to or death of any person or persons whomsoever,

or for any damage to or loss or destruction of any property whatsoever, or for any damages of any nature suffered by a party resulting from any such failure or neglect.

(c) If by reason of any mechanical failure or for any other cause not resulting from an accident or derailment, a train, locomotive or equipment of WLE becomes stalled or unable to proceed under its own power, or if in emergencies crippled or otherwise defective cars are set out of WLE's trains on the Subject Trackage, NSR shall furnish motive power or such other assistance as may be necessary to haul, help, or push such trains, locomotives, or cars, or to properly move the disabled equipment off the Subject Trackage. For such service, WLE shall pay NSR a reasonable charge therefore, which shall be in accordance with NSR's Schedule of Surcharges and Rates for Billings to U.S. Railroads and which shall be comparable to the rate schedules of U.S. Class I Railroads.

(d) If it become necessary to make repairs to or adjust or transfer the lading of such crippled or defective cars in order to move them off the Subject Trackage, such work shall be done by NSR. For such service, WLE shall pay NSR a reasonable charge therefore, which shall be in accordance with NSR's Schedule of Surcharges and Rates for Billings to U.S. Railroads and which shall be comparable to the rate schedules of U.S. Class I Railroads.

#### **SECTION 7. MILEAGE AND CAR HIRE**

All mileage and car hire charges accruing on cars in each party's trains on the Subject Trackage shall be assumed by that party and reported and paid by that party directly to the owner of such cars.



**SECTION 8. CLEARING OF WRECKS**

Whenever use of the Subject Trackage requires rerailling, wrecking service or wrecking train service, NSR shall arrange for such service, including the repair and restoration of roadbed, track, and structures. The cost and expense thereof, including without limitation, loss of, damage to, and destruction of any property whatsoever and injury to or death of any person or persons whomsoever resulting therefrom, shall be apportioned in accordance with the provisions of Section 11 hereof. All locomotives, cars, and equipment and salvage from the same so picked up and removed which are owned by or under the management and control or used by a party at the time of such wreck shall be promptly delivered to it.

**SECTION 9. ADDITIONS TO AND/OR RETIREMENTS**

(a) The cost and expense of future additions or changes shall be borne by the party or parties for whose benefit they are made. However, any changes required, subsequent to the Effective Date hereof, by any public authority shall be borne by the parties hereto in proportion to the parties' usage over the affected location, as measured by usage during the twelve (12) month period after the addition or change is put into service. Nothing in this Section 9(a) shall be interpreted as expressing an intention of either party to request or consent to any future additions or changes.

(b) In accordance with the provisions of Section 14, NSR shall have the right to retire and eliminate all or part of the Subject Trackage. All costs and expenses relating to removal of track, associated track appurtenances, signals and related

facilities necessary to effect abandonment, discontinuance or complete withdrawal of either party shall be at the sole cost and expense of said party.

**SECTION 10. MAINTENANCE OF CONNECTIONS**

All existing connections or facilities which are jointly used by the parties hereto under existing agreements or practices shall continue to be maintained, repaired, and renewed by and at the expense of the party or parties responsible for such maintenance, repair and renewal under such agreements or practices.

**SECTION 11. LIABILITY**

The responsibility of the parties hereto as among themselves for loss of, damage to, or destruction of any property whatsoever, or injury to or death of any person or persons whomsoever, or any damage to or destruction of the environment whatsoever, including without limitation land, air, water, wildlife, and vegetation resulting from, arising out of, incidental to, or occurring in connection with this Agreement, shall be determined as follows:

(a) Whenever any loss of, damage to, or destruction of any property whatsoever, or injury to or death of any person or persons whomsoever, or any damage to or destruction of the environment whatsoever, including without limitation land, air, water, wildlife and vegetation, occurs with the trains, locomotives, cars, or equipment of, or in the account of, one party hereto being involved, without the trains, locomotives, cars or equipment of, or in the account of, the other party hereto being involved, such involved party shall assume all liability therefor and bear all cost and

expense in connection therewith and shall forever protect, defend, indemnify, and hold harmless the other party hereto, its parent and subsidiaries, and each of their respective directors, officers, agents, and employees from and against any such liability, cost and expense.

(b) Whenever any loss of, damage to, or destruction of any property whatsoever, or injury to or death of any person or persons whomsoever, or any damage to or destruction of the environment whatsoever, including without limitation land, air, water, wildlife, and vegetation, occurs with the trains, locomotives, cars or equipment of, or in the account of, both NSR and WLE being involved, each shall separately assume and bear all liability, cost, and expense for loss of and damage to said trains, locomotives, cars (including without limitation lading), and equipment operated by each of them and for injury to and death of each of their respective directors, officers, agents, and employees (including sole employees), and persons in each of their care and custody. All liability, cost, and expense for injury to and death of any other person or persons whomsoever, and for loss of, damage to, and destruction of all other property (including without limitation the Subject Trackage) so occurring shall be borne equally by such parties involved.

(c) Whenever any loss of, damage to, or destruction of any property whatsoever, or injury to or death of any person or persons whomsoever, or any damage to or destruction of the environment whatsoever, including without limitation land, air, water, wildlife, and vegetation, occurs without the trains, locomotives, cars, or equipment of, or in the account of, any party hereto being involved, or if it cannot be determined which party's or parties' trains, locomotives, cars or equipment are

involved, each party hereto shall separately assume and bear all liability, cost, and expense for injury to and death of each of their directors, officers, agents, and employees (including sole employees), and persons in each of their care and custody, and all liability, cost, and expense for injury to and death of any other person or persons whomsoever, and for loss of, damage to, and destruction of all other property (including without limitation the Subject Trackage) so occurring shall be borne equally by the parties hereto.

(d) Notwithstanding anything to the contrary in Sections 11(a), (b) and (c), above, when any damage to or destruction of the environment, including without limitation land, air, water, wildlife, and vegetation, occurs with one or more trains of both NSR and WLE being involved, then, as between themselves, NSR and WLE agree that (i) NSR shall be solely responsible for any damage or destruction to the environment and to third parties which results solely from a substance transported in NSR equipment from which there was a release, (ii) WLE shall be solely responsible for any damage or destruction to the environment and to third parties which results solely from a substance transported in WLE equipment from which there was a release, and (iii) NSR and WLE shall be responsible, in proportion to the total number of pieces of NSR equipment and WLE equipment from which there was a release, for any damage or destruction to the environment and to third parties which results solely from one or more substances transported in both NSR equipment and WLE equipment from which there was a release.

(e) Whenever any liability, cost, or expense is assumed by or apportioned to a party hereto under the foregoing provisions, that party shall forever protect, defend,

indemnify, and save harmless the other party to this Agreement and its directors, officers, agents, and employees from and against that liability, cost, and expense assumed by that party or apportioned to it regardless of whether caused in whole or in part by the fault, failure, negligence, misconduct, malfeasance or misfeasance of the indemnified party or its directors, officers, agents or employees.

(f) The parties hereto agree that each and all of its indemnity commitments in this Agreement in favor of the other party hereto shall also extend to and indemnify their respective parent corporations, subsidiaries and affiliates, and all of their respective directors, officers, agents and employees.

(g) In every case of death or injury suffered by an employee of a party hereto, when compensation to such employee or employee's dependents is required to be paid under any workmen's compensation, occupational disease, employer's liability, or other law, and a party under the provisions of this Agreement is required to pay said compensation, if such compensation is required to be paid in installments over a period of time, such party shall not be released from paying any such future installments by reason of the expiration or other termination of this Agreement prior to any of the respective dates upon which any such future installments are to be paid.

(h) Each of WLE and NSR shall indemnify and hold harmless the other party hereto against any and all costs and payments, including benefits, allowances, and arbitration, administrative and litigation expenses, arising out of lawsuits, claims or grievances brought by or on behalf of its own employees or their collective bargaining representatives, either pursuant to employee protective conditions imposed by a governmental agency upon the agency's approval or exemption of this Agreement and

operations hereunder or pursuant to a collective bargaining agreement. It is the intention of the parties hereto that WLE and NSR each shall bear the full costs of protection of its own employees under employee protective conditions that may be imposed, and of grievances filed by its own employees arising under its collective bargaining agreements with its employees. Similarly, each party hereto agrees to indemnify and hold harmless the other party against any and all costs and payments, including judgments, damages, attorneys' fees and litigation expenses, arising out of claims, lawsuits and actions brought by or on behalf of its own employees pursuant to any provision of law, including common law, and based on employment arising out of the operations covered by this Agreement, except to the extent otherwise specifically provided in this Agreement.

(i) If any employee of WLE shall neglect, refuse or fail to abide by NSR's rules, instructions and restrictions governing the operation on or along the Subject Trackage, such employee shall upon written request of NSR, be prohibited by WLE from working on the Subject Trackage. If any party shall deem it necessary to hold a formal investigation to establish such neglect, refusal or failure on the part of any employee of WLE, then upon such notice presented in writing, WLE shall promptly hold an investigation in which all parties concerned shall participate and bear the expense for its officers, counsel, witnesses and employees. Notice of such investigations to a WLE employee shall be given by WLE officers, and such investigation shall be conducted in accordance with the terms and conditions of schedule agreements between WLE and its employees. If the result of such investigation warrants, such employee shall, upon written request by NSR, be

withdrawn by WLE from service on NSR's property, and WLE shall release and indemnify NSR from and against any and all claims and expenses because of such withdrawal.

(j) Each party shall assume and bear all responsibility for such loss, damage, injury and death caused by acts or omissions of any of its employees while under the influence of drugs or alcohol and Section 11(a), (b) and (c) shall not apply.

(k) For the purposes of assigning responsibility for loss or damage under this Section 11 as between the parties hereto, the trains, cars and equipment of a railroad other than NSR and WLE shall be considered to be the trains, cars and equipment of NSR.

## **SECTION 12. INVESTIGATION**

(a) Each party shall investigate, adjust, and defend all cargo related claim liability filed with it in accordance with 49 U.S.C. Section 11706 or 49 C.F.R. Section 1005, or in accordance with any applicable transportation contract filed pursuant to 49 U.S.C. 10709.

(b) In the event a claim or suit is asserted against one of the parties hereto which is the other party's duty to investigate, adjust or defend, then, unless otherwise agreed, such other party shall, upon request, take over the investigation, adjustment, and defense of such claim or suit.

(c) All costs and expenses in connection with the investigation, adjustment, and defense of any claim or suit shall be included as costs and expenses in applying the liability provisions set forth herein, except that salaries or wages of full-time

employees of any party, including claim agents and attorneys, engaged directly or indirectly in such work shall be borne by the employing party.

(d) Excluding cargo related claim liability filed in accordance with 49 U.S.C. 11706 or 49 C.F.R. Section 1005, or in accordance with any applicable transportation contract filed pursuant to 49 U.S.C. Section 10709, no party shall settle or compromise any claim, demand, suit or cause of action for which the other party has any liability hereunder without the concurrence of such other party if the consideration for such settlement exceeds Thirty-Five Thousand Dollars (\$35,000.00).

### SECTION 13. TERM

(a) This Agreement shall become effective on the date first appearing above, and following the expiration of any time periods required by the issuance of labor notices by NSR, if any, (the "Effective Date" herein) and shall remain in full force and effect for a period of twenty-five (25) years. The Effective Date of this Agreement shall be confirmed by letter agreement signed by NSR and WLE. Notwithstanding the foregoing, should a reconnection be made which would permit a progressive move over CP Short from the Wellington – CP Short Route to the CP Short – Knob Route, then this Agreement shall expire as to the Berea – CP Short Route and instead be effective only as to the CP Short – Knob Route (all other terms and conditions remaining effective), but effective only to the extent this Agreement would be effective in the absence of, and not taking into account the existence and substance of, this sentence. Further notwithstanding the foregoing, should any party who owns or controls the Wellington – CP Short Route, or any portion thereof which reaches CP



Short acquire WLE or otherwise control WLE and/or its operations, then this Agreement shall expire as to the Berea – CP Short Route and instead be effective only as to the CP Short – Knob Route (all other terms and conditions remaining effective), but effective only to the extent this Agreement would be effective in the absence of, and not taking into account the existence and substance of, this sentence.

(b) Termination of this Agreement shall not relieve or release either party hereto from any liability it may have incurred or any obligation which may have accrued under any provision of this Agreement prior to said termination.

(c) The twenty-five (25) year term set forth in Section 13(a) relates solely to this Agreement's terms and conditions, and not the underlying right of movement. The parties intend that the underlying right of movement, the trackage rights itself, will be governed by the principles found in *Thompson v. Texas Mexican Ry.*, 328 U.S. 134, 145 (1946).

#### **SECTION 14. ABANDONMENT**

NSR may abandon the Subject Trackage. In the event regulatory authority is required to effect such abandonment, WLE will not interfere with NSR's actions to seek and to exercise such authority. In the event regulatory authority is required for WLE to discontinue its own operations over the Subject Trackage, WLE will seek and diligently pursue such regulatory authority at the same time that NSR seeks regulatory authority to abandon the Subject Trackage, or as soon thereafter as WLE may do so in accordance with applicable statutes and regulations, unless WLE intends to acquire the Subject Trackage from NSR pursuant to 49 U.S.C. Section 10904 or other similar

provision. Unless WLE or another party acquires the Subject Trackage for continued rail use, WLE shall exercise its authority to discontinue its operations pursuant to this Agreement upon the date established by NSR for abandonment of the Subject Trackage, or upon the earliest authorized date of exercise of the regulatory authority to discontinue operations, whichever is later. If regulatory authority for discontinuance of WLE's operation is not required, WLE shall discontinue its operations hereunder on the date that NSR is authorized to abandon the Subject Trackage. Upon discontinuance of WLE's operations, this Agreement shall terminate and be of no further force and effect, except that termination of this Agreement shall not relieve or release either party hereto from any obligations assumed or from any liability which may have arisen or been incurred prior to said termination. As used in this Section 14, Subject Trackage means the entire Subject Trackage or any portion or portions thereof.

#### **SECTION 15. GENERAL PROVISIONS**

(a) This Agreement and each and every provision hereof are for the exclusive benefit of the parties hereto and not for the benefit of any other party. Nothing contained herein shall be taken as creating or increasing any right in any other party or parties to recover by way of damages or otherwise against any of the parties hereto.

(b) All Section headings are inserted for convenience only and shall not affect any construction or interpretation of this Agreement.

(c) This Agreement and the attachments annexed hereto and integrated herewith contain the entire agreement among the parties hereto containing the subject matter hereof, and supersede any and all oral or verbal understandings between said parties.

(d) No term or provision of this Agreement may be changed, waived, discharged, or terminated except by an instrument in writing signed by the parties hereto.

(e) WLE shall not assign or transfer this Agreement or any of its rights hereunder to any person, firm or corporation without obtaining the prior written consent of NSR, which such consent may be given or withheld at NSR's sole discretion.

(f) For the purpose of this Agreement, the cars and equipment (and any employees, passengers and property contained therein) in the revenue waybill account of one of the parties hereto, while being moved upon or over the Subject Trackage shall, as between the parties hereto, be deemed to be the cars, equipment, employees, passengers and property of that party hereto. As to all other trains, locomotives, cars and equipment, as between the parties hereto, said trains, locomotives, cars, equipment, employees, passengers and property that are under the control of a party hereto shall be deemed to be the trains, locomotives, cars, equipment, employees, passengers and property of that party.

(g) All words, terms, and phrases used in this Agreement shall be construed in accordance with the generally applicable definition or meaning of such words, terms and phrases in the railroad industry.

**SECTION 16. ARBITRATION**

(a) In the event of any dispute, claim, question, or disagreement arising from or relating to this Agreement or the breach thereof, the parties hereto shall use their best efforts to settle the dispute, claim, question, or disagreement. To this effect, they shall consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to both parties. If they do not reach such solution within a period of sixty (60) days, then, upon notice by either party to the other, all disputes, claims, questions, or differences shall be finally settled by arbitration administered by the American Arbitration Association. The American Arbitration Association shall apply the provisions of its Commercial Arbitration Rules as most recently published on or before the date of this Agreement, except to the extent they conflict with a provision of this Section 16.

(b) Within fifteen (15) days after the commencement of arbitration, each party shall select one person to act as arbitrator, and the two selected shall select a third arbitrator within ten (10) days of their appointment. If the arbitrators selected by the parties are unable or fail to agree upon the third arbitrator, the third arbitrator shall be selected by the American Arbitration Association. Each arbitrator shall have knowledge of the railroad industry.

(c) To the extent possible, the two parties shall agree on common elements of a proposed solution to the dispute at hand. Each party shall submit to the arbitrator and exchange with each other in advance of the hearing their

last, best offers, with regard to the elements of a proposed solution to the dispute at hand that build upon the common elements already agreed upon. The arbitrators shall be limited to awarding only one or the other of the two offers submitted.

(d) The arbitrators will have no authority to award punitive damages or any other damages not measured by the prevailing party's actual damages, and may not, in any event, make any ruling, finding or award that does not conform to the terms and conditions of this Agreement.

(e) Neither party nor the arbitrators may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties.

(f) The arbitration proceedings shall be conducted in Washington, D.C.

(g) In rendering the award, the arbitrator shall determine the rights and obligations of the parties according to the substantive and procedural laws of Delaware.

## **SECTION 17. NOTICE**

Any notice required or permitted to be given by one party to the other party hereto under this Agreement shall be deemed given on the date sent by certified mail, or by such other means as the parties may mutually agree, and shall be addressed as follows:

(a) If to WLE:

c/o President  
Wheeling & Lake Erie Railway Company  
100 East First Street  
Brewster, OH 44613

(b) If to NSR:

c/o Executive Vice President - Operations  
Norfolk Southern Railway Company  
Three Commercial Place  
Norfolk, VA 23510-2191

With copy to:

c/o Senior Director Joint Facilities  
Norfolk Southern Railway Company  
1200 Peachtree St.  
Atlanta, GA 30309

Each party may provide changes in its address to the other party by the means specified above.

*[Remainder of Page Intentionally Blank – Signature Page Follows]*

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the day and year first above written.

WITNESS: WHEELING & LAKE ERIE RAILWAY COMPANY

\_\_\_\_\_  
As to WLE By: \_\_\_\_\_  
President

WITNESS: NORFOLK SOUTHERN RAILWAY COMPANY

\_\_\_\_\_  
As to NSR By: \_\_\_\_\_  
Executive Vice President-Operations

THIS SUPPLEMENTAL AGREEMENT, entered into as of this 28th day of March, 2011, by and between WHEELING & LAKE ERIE RAILWAY COMPANY (hereinafter referred to as "WLE"), and NORFOLK SOUTHERN RAILWAY COMPANY (hereinafter referred to as "NSR").

WHEREAS, WLE and Norfolk and Western Railway Company (hereinafter referred to as "NW") entered into an Agreement dated July 4, 1994 ("Trackage Rights Agreement"), granting WLE trackage rights over NW between Bellevue, Ohio and Berlin Heights, Ohio; and between Shinrock, Ohio and the Huron Dock Connection in Huron, Ohio; and

WHEREAS, NW was merged into NSR as of September 1, 1998, and

WHEREAS, the Trackage Rights Agreement was for an initial term of five (5) years, with the option for WLE to extend the term of the Trackage Rights Agreement for an additional five (5) year term; and

WHEREAS, WLE exercised such option and extended the Trackage Rights Agreement for a second five (5) year term; and

WHEREAS, the Trackage Rights Agreement, absent the Settlement Agreement, as defined hereinafter, would have expired by limitation on July 3, 2004; and

WHEREAS, in 1997, Norfolk Southern Corporation ("NSC"), parent to NSR, entered into a Transaction Agreement (the "Transaction Agreement") among NSC and CSX Transportation, Inc. ("CSXT"), a wholly-owned subsidiary of CSX Corporation ("CSX"); NSR; Conrail Inc. ("CRR"); Conrail, a wholly-owned subsidiary of CRR; and CRR Holdings LLC;

WHEREAS, pursuant to the Transaction Agreement, CSX and NSC indirectly acquired all the outstanding capital stock of CRR;

WHEREAS, the parties hereto entered into a "Settlement Agreement", addressing certain issues related to the acquisition of the outstanding capital stock of CRR and implementing and satisfying certain conditions imposed by the Surface Transportation Board ("STB") in connection with its approval of the Transaction Agreement, including an extension of the term of the Trackage Rights Agreement, and

WHEREAS, one element of that Settlement Agreement was an agreement to extend the term of the Trackage Rights Agreement for a ten (10) year term from the date of STB approval of the Settlement Agreement; and

WHEREAS, the parties hereto submitted the Settlement Agreement to the STB for approval under STB Finance Docket No. 33388 (Sub-No. 95) on August 6, 2004; and



WHEREAS, the STB served a decision on January 26, 2005 approving the Settlement Agreement; and

WHEREAS, the parties hereto desire to enter into this Supplemental Agreement to reinstate the referenced Trackage Rights Agreement and extend the term for ten (10) years from the date of service of the STB decision approving the Settlement Agreement;

NOW, THEREFORE, the parties hereto, intending to be legally bound, agree as follows:

**SECTION 1. EXTENSION OF THE TERM OF THE TRACKAGE RIGHTS AGREEMENT**

Subject to the terms and conditions herein provided, the parties hereto agree to extend the term of the Trackage Rights Agreement for a period of ten (10) years from January 26, 2005.

**SECTION 2. EFFECTIVE DATE**

This Supplemental Agreement shall be effective as of January 26, 2005.

**SECTION 3. EFFECT ON TRACKAGE RIGHTS AGREEMENT**

Except as herein modified, the Trackage Rights Agreement, as reinstated, shall remain in full force and effect.

**SECTION 4. ADOPTION OF PROVISIONS**

The following provisions in the Trackage Rights Agreement are adopted herein as if set forth in their entirety, in each case as applying to this Supplemental Agreement: Section 18 (General Provisions), Section 19 (Successors and Assigns), and Section 20 (Notice).

**SECTION 5. ARBITRATION**

(a) In the event of any dispute, claim, question, or disagreement arising from or relating to the Trackage Rights Agreement (as supplemented by this Supplemental Agreement) or the breach thereof, the parties hereto shall use their best efforts to settle the dispute, claim, question, or disagreement. To this effect, they shall consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to both parties. If they do not reach such solution within a period of sixty (60) days, then, upon notice by either party to the other, all disputes, claims, questions, or differences shall be finally settled by arbitration administered by the

American Arbitration Association. The American Arbitration Association shall apply the provisions of its Commercial Arbitration Rules as most recently published on or before the date of this Supplemental Agreement, except to the extent they conflict with a provision of this Section 5.

(b) Within fifteen (15) days after the commencement of arbitration, each party shall select one person to act as arbitrator, and the two selected shall select a third arbitrator within ten (10) days of their appointment. If the arbitrators selected by the parties are unable or fail to agree upon the third arbitrator, the third arbitrator shall be selected by the American Arbitration Association. Each arbitrator shall have knowledge of the railroad industry.

(c) To the extent possible, the two parties shall agree on common elements of a proposed solution to the dispute at hand. Each party shall submit to the arbitrator and exchange with each other in advance of the hearing their last, best offers, with regard to the elements of a proposed solution to the dispute at hand that build upon the common elements already agreed upon. The arbitrators shall be limited to awarding only one or the other of the two offers submitted.

(d) The arbitrators will have no authority to award punitive damages or any other damages not measured by the prevailing party's actual damages, and may not, in any event, make any ruling, finding or award that does not conform to the terms and conditions of the Trackage Rights Agreement (as supplemented by this Supplemental Agreement).

(e) Neither party nor the arbitrators may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties.

(f) The arbitration proceedings shall be conducted in Washington, D.C.

(g) In rendering the award, the arbitrator shall determine the rights and obligations of the parties according to the substantive and procedural laws of Delaware.

*[Remainder of Page Intentionally Blank – Signature Page Follows]*

EXECUTION VERSION

IN WITNESS WHEREOF, the parties hereto have caused this Supplemental Agreement to be duly executed as of the day and year first above written.

WITNESS:

WHEELING & LAKE ERIE RAILWAY  
COMPANY

Sheryl L. Turant  
As to WLE

By: W. Williams  
President

WITNESS:

NORFOLK SOUTHERN RAILWAY COMPANY

Debra B. Cylus  
As to NSR

By: M. Manion  
~~Executive Vice President-Operations~~ MSM